TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted].

No. [redacted] 40

MINNESOTA STATE LIBRARY

CHARLES OVERTON, PLAINTIFF IN ERROR,

vs.

THE STATE OF OKLAHOMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

FILED JULY 9, 1912.

(23,282)

(23,282)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 294.

CHARLES OVERTON, PLAINTIFF IN ERROR,

vs.

THE STATE OF OKLAHOMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 5, 1914.

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a *Return to Writ.*

UNITED STATES OF AMERICA,
Criminal Court of Appeals of Oklahoma, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Criminal Court of Appeals of the State of Oklahoma, in the City of Oklahoma City, this June 5, 1912.

[Seal Criminal Court of Appeals, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Criminal Court of Appeals of the State of Oklahoma,
By JESSIE PARDOE, *Deputy.*

1 (Filed 18th Day of April, 1911.)

In the Criminal Court of Appeals of Oklahoma.

No. A-307.

CHARLEY OVERTON, Appellant,
v.
STATE OF OKLAHOMA, Appellee.

Appeal from the County Court of Tulsa County.

Tried Before Hon. N. J. Gulser, County Judge.

Biddison, Campbell & Eagleton, attorneys for appellant.
Fred S. Caldwell, attorney for State.

Per Curiam:

Appellant was convicted in the county court of Tulsa County for violating the prohibitory liquor law, and his punishment was assessed at a fine of $100 and 60 days' imprisonment in the county jail.

We have carefully considered the brief of counsel for appellant and have read over the entire transcript of the record and case-made. We find that a demurrer was not filed to the information, and that no exceptions were reserved to the instruction of the court. All of the questions presented in the brief have heretofore been decided by this court adversely to the contentions of counsel for appellant. In view of the immense amount of work we have upon our hands, it would be a useless consumption of time and space to re-discuss these

questions. We think the evidence in the case amply sup-
2 ports the verdict.

The judgment of the trial court is therefore affirmed and the cause is remanded to the county court of Tulsa county, with directions that it proceed with the execution of its judgment.

3 Filed Apr. 20, 1912. W. H. L. Campbell, Clerk.

In the Criminal Court of Appeals of Oklahoma.

No. A-307.

CHARLES OVERTON, Appellant,
v.
STATE OF OKLAHOMA, Appellee.

Syllabus.

By the Court:

1. The conveying clause of sec. 4180 of Snyder's Comp. Laws of Okla. 1909 is not in conflict with the interstate commerce clause of the Constitution of the United States and is not a burden on interstate commerce in intoxicating liquors.

2. The statutes of the State of Oklahoma are to be construed in connection with and in subordination to the Constitution of the United States and the acts of Congress adopted in pursuance thereof.

3. For evidence sustaining a conviction for unlawfully conveying intoxicating liquors from one place in the State to another place therein, see facts stated in the opinion.

4. The jury are the exclusive judges of the weight of the evidence and the credibility of the witnesses, and where there is any evidence in the record from which the jury could reasonably conclude that the defendant is guilty, this court will not disturb their verdict upon the ground that it is contrary to the evidence, unless it affirmatively appears from the record that the jury were influenced by improper motives in arriving at the verdict.

5. Misconduct occurring in the jury room while the jury was considering its verdict cannot be shown by the affidavits or testimony of a juror.

6. Every jury is sworn *to* each case to render a true verdict according to the law and the evidence. Where a juror files an affidavit or testifies that he was influenced by anything in arriving at the verdict except the law and testimony, he swears to his own dishonor and stultifies and impeaches himself and informs the court under oath that he has been guilty of the grossest contempt in ignor-
4 ing and disregarding the instructions of the court. He should therefore be punished for contempt of court.

7. Laws are enacted and courts are established to punish and suppress crime. If this court were to undertake to hunt for excuses to turn guilty men loose, it would be a gross perversion of its duty

and an outrage upon the rights of the law-abiding people of the State. It is our duty to so construe the law as will protect society and not be a source of encouragement and protection to crime and criminals.

8. Lawyers look at a case from the standpoint of their client's interest alone. But this court is charged with the double duty of seeing that no defendant shall be punished unjustly and also with seeing that the rights of society are respected and protected. We must therefore look at both sides of each record presented to us.

On Motion for Rehearing.

Opinion of the Court by FURMAN, *Presiding Judge:*

When this cause was first submitted we considered every proposition presented in the brief of counsel for appellant but did not deem it necessary to discuss those propositions in detail, as we had already passed upon every one of them. On account of the zeal and ability with which counsel for appellant support their motion for a rehearing we will, however, now discuss each proposition presented. Their first proposition is as follows:

"1. Conveying Clause Unconstitutional. The conveying clause of Sec. 4180 of Snyder's Compiled Laws of Oklahoma is unconstitutional because it discriminates against liquors purchased through an interstate shipment. It is in conflict with the interstate commerce clause of the Constitution of the United States, and is a burden of interstate commerce in intoxicating liquors."

We cannot agree with this contention. The statutes of Oklahoma are construed in connection with and in subordination to the Constitution of the United States and the acts of Congress passed in pursuance thereof.

In the case of Maynez v. State, 6 Okla. Cr. 487, this court expressly held that an interstate shipment of whiskey constituted a lawful purchase as contemplated by our statute.

In the case of Titsworth v. State, 2 Okla. Cr. 268, this court said:

"The Constitution of the United States declares that Congress shall have power 'to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.' To 'regulate' means to control. So it is seen that the power of regulating or controlling commerce between the states is vested exclusively in Congress, and that no state has the power to pass any law upon this subject, or which would in any manner interfere with or abridge the right of one of its citizens to purchase in another state any article of commerce which could be lawfully sold in the state where the purchase is made, and bring it to his home in his own state for his personal use. This has been decided so often that no person who is well informed upon this subject will question the rule above stated. This matter has been passed upon by the Supreme Court of Oklahoma in Schwedes v. State, 1 Okla. Cr. 245, 99 Pac. 804, and by the Criminal Court of Appeals in the cases of Huston Hudson v. State, ante, p. 176, 101 Pac. 275; Webb High v. State, ante, p. 161, 101 Pac. 115; and Josh McCord v. State, ante, p. 214, 101 Pac. 280. The cases

above referred to contain such a thorough discussion of this matter, and quote from such an overwhelming weight of authorities, that it is not necessary to repeat what will be found in them. If we are in error touching this matter, it will be an easy thing for the enforcement officer of this state to make a test case in a civil proceeding, and carry it to the Supreme Court of the United States for final determination. If that tribunal sees fit to reverse its former decisions,
we will be bound by such action, and cheerfully follow it.
6 But, until this is done, we feel constrained to adhere to the decisions as they stand now.

"If the decisions of the Supreme Court of the United States are wrong, application should, and can, be made to that court for a reversal of these decisions. It is a waste of time, money and labor to appeal to this court to set anything aside which that court has decided. The Supreme Court of the United States, of necessity, must be the final judge of the construction of the United States Constitution. Otherwise we would have a hydra-headed judicial system in which 47 independent appellate courts could construe this instrument as they pleased, which would result, not only in confusion, but in civil war. Each tribunal would be supported by the military forces of the government which it represented. This would result in death and destruction to our form of government. Certainly no reasonable person desires this court to adopt a policy which would bring about such serious consequences as this. It would be treason itself. One thing can be depended upon, and that is, that this court will not make any such insane attempt. Under the Constitution of the United States, and the decisions of the Supreme Court of the United States, it is clear that any resident of Oklahoma can purchase intoxicating liquors in another state, and ship them into this state, and to points of destination, for his own personal use, and that such shipments constitute interstate commerce, and that any state law to the contrary is void. But these shipments lose their character as interstate commerce as soon as they reach the point of their destination, and any further shipment of such liquors is subject to state control. The exact language of the Supreme Court of the United States is as follows:

"Equally established is the proposition that the right to send liquors from one state into another state, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress,
7 and hence that a state law which denies such a right, or substantially interferes or hampers the same, is in conflict with the Constitution of the United States. * * * But the right of persons in one state to ship liquor into another state to his residence for his own use is derived from the Constitution of the United States, and does not rest on the state law. Either the conditions attached by the state law unlawfully restrain the right, or they do not. If they do, then they are void.'

"And again, the court, speaking of the right of every citizen of a state to purchase and have shipped to him liquors for his own use, says:

" 'But the right arises from the Constitution of the United States; it exists wholly independent of the will of either the law-making or executive power of the state; it takes its origin out of the state of South Carolina, and finds its support in the Constitution of the United States. Whether or not it can be exercised depends solely upon the will of the person making the shipment, and cannot be, in advance, controlled or limited by the action of the state in any department of its government.' (Vance v. Vandercook, 170 U. S. 439, 18 Sup. Ct. 674, 42 L. Ed. 1100.)

"If a resident of this state may lawfully purchase intoxicating liquors in another state, and ship them to his place of business or home, for his own use upon what ground can the claim be made that he cannot keep such liquors at his home or place of business, provided that he does so exclusively for his own use? Is it not true that the grant of power to do a certain thing includes and carries with it the right to do all things which are necessary to the full exercise and enjoyment of the power expressly granted? There can be but one logical answer to this question. If a person can lawfully bring intoxicating liquors to his home or place of business, so long as he does not attempt or intend to use such liquors except for
8 his own use, he has the right to keep them there. There is no logical escape from the conclusion that, if a resident of this state has the constitutional right to ship into the state intoxicating liquors for his own use, he has the same right to receive, keep and use such liquors for the purpose for which they were shipped."

Our statute nowhere attempts to interfere with the right of any person in Oklahoma to purchase intoxicating liquors and ship them into the state as interstate commerce, and carry them as such to his home or place of business for his own use, and this right has been repeatedly recognized by the decisions of this court. As we understand the decisions of the Supreme Court of the United States, this fully recognizes every right guaranteed by the commerce clause of the Constitution of the United States. We are still of the opinion that this question has been decided adversely to appellant by this court in our former opinions. If we are wrong in the conclusion at which we have arrived, as this presents a Federal question, an appeal will lie from our decision to the Supreme Court of the United States, and as we know that counsel for appellant are both earnest and able we suggest that they carry this question to the Supreme Court of the United States for final determination.

The second proposition of counsel for appellant is that the verdict and judgment are contrary to the law and evidence, the contention of counsel being that the liquor in question was an interstate shipment which appellant was conveying from the depot to his home; and counsel assert that the evidence on this question is conclusive and undisputed. An examination will show that this contention is not supported by the record. This shows how easy it is for lawyers who look at but one side of a case to be honestly mistaken as to the effect of the testimony against their clients. But it is the duty of this court to look at both sides of a case and to consider the entire record for the double purpose of seeing that a defendant has not been

illegally convicted and is not unjustly punished, and also to
9 see that the rights of society at large are respected and protected.

The appellant testified in his own behalf that the liquor in question was an interstate shipment over the M., K. & T. Ry. Co. from Kansas City, Mo., and that when arrested he was conveying it from the depot in Tulsa to his home. He testified it was shipped in two boxes or cases; that when it reached Tulsa the tops and bottoms of the boxes were torn off and he placed the whisky in a sack; that when he went to the depot and obtained the whisky it was 1 or 2 o'clock at night; that he obtained it from the freight house foreman, one Frank Carter; that appellant went to Carter's house and pulled him out of bed; that he went at 2 o'clock at night to get this whisky. On cross-examination he was asked what he was going to do with 10 cases of whisky the officers caught him with on the 10th day of June preceding, which question, upon the advice of counsel, he declined to answer upon the ground that such answer would incriminate him.

Appellant was arrested on the night of July 1st. He testified that an expense bill which he offered in evidence marked "exhibit B," shows that the whisky was received at Tulsa on the 27th day of June prior to the time when appellant was arrested with it, but that he never went for the whisky until between 1 and 2 o'clock at night on July 1st.

Frank Carter who was warehouse foreman of the M., K. & T. Ry. Co. at Tulsa, testified that on the night of June 30th between 2 and 3 o'clock appellant presented to him an expense bill on two cases of whisky and requested him to deliver said whisky to appellant; that the whisky had been in the depot of the railroad company at Tulsa since the 27th day of June; that appellant came to the room of witness and woke him up and had him get out of bed for the purpose of delivering the whisky; that he did not keep the warehouse open at night; that the regular hours for delivering goods at the depot were from 6.45 in the morning until 10 o'clock at night. This
10 witness did not say anything about the boxes or cases in which the whisky was shipped being broken open and that appellant had been forced to take the whisky away in a sack. His testimony establishes the fact that at the transaction to which he testifies he delivered to appellant two cases of whisky. This was all of the evidence introduced by appellant.

J. J. Morgan testified for the state that he was sheriff of Tulsa county, Oklahoma. That about 2 o'clock on the morning of July 1st, 1909, witness saw a cab at Elgin street in the city of Tulsa where it crosses the Frisco right-of-way, and that said cab was driving from the north; that witness ordered the hack to stop; that the driver did not do so until the witness drew his gun; that the driver saw the gun and stopped his hack and appellant said "You are not going to shoot, are you?" Witness replied "No," and witness then got into the hack and found a sack; that he asked what it contained, but does not remember what answer, if any, appellant made. The witness

then seized the sack and found it contained 94 one-half pint bottles of whiskey and two broken bottles.

Sam Walker testified that he was a policeman in the city of Tulsa; that he was present and acting with the sheriff when the arrest in this case was made. His testimony corroborated that of the sheriff in all respects. This was all of the evidence offered in behalf of the state.

Upon the trial of the case the court, at the request of appellant, instructed the jury upon this issue as follows:

"The court further instructs the jury that if they find from the evidence that the defendants did carry intoxicating liquors from one place within the State of Oklahoma to another place within the State but find that said intoxicating liquors had been shipped from a point within the State of Missouri consigned to the defendants or either of them at the city of Tulsa, Tulsa county, Oklahoma, and that
11 the defendant consigned was carrying said intoxicating liquors from where he had receive them from the common carrier which had brought them into the State of Oklahoma, to his home, then you shall find the defendants not guilty."

It is seen by this that the court recognized the right of appellant to convey an interstate shipment of whisky from the depot to his home and so instructed the jury.

In the case of Maynes v. State, 6 Okla. Cr. 487, this court expressly decided that intoxicating liquors received as interstate shipments, constitute a lawful purchase of such intoxicating liquors, but that the burden is upon the appellant to prove this fact. The testimony of the state's witness made out a prima facie case against appellant. It is true that appellant testified that the whiskey in question was an interstate shipment, and that he was conveying it to his own home, but the entire circumstances of the case throw suspicion upon his evidence, and we think warranted the jury in rejecting it. If the state was bound by the testimony of the defense, it would be impossible to obtain a conviction in any case. Even the most positive and direct evidence sworn to by a large number of witnesses may be entirely destroyed by its inherent weakness. For instance, we are informed in the Bible that the Roman soldiers swore that while they were asleep the disciples stole the body of Christ. This sworn statement has always been rejected by intelligent people for the obvious reason if no other, that if the soldiers were asleep they could not tell what *because* of the body of Christ during that time. Appellant's testimony in this case could scarcely be more incredible. It was proven that it was not the custom of the railroad company to deliver shipments at night, yet we are asked to believe that appellant, between 1 and 3 o'clock at night awoke the warehouse master and obtained this whisky which had been there for three days; that the
12 two cases in which the whisky was shipped were broken and could not be carried and appellant therefore placed the whiskey in a sack, although the defendants' witness, Carter, did not testify to anything of the kind. If it was true that the whiskey constituted a legal purchase, which appellant had a right to carry to his home, why the necessity of *of* this secret manner of

carrying it home? We have the answer in sacred writ. "They love darkness rather than light because their deeds are evil." If appellant was using whisky for a lawful purpose, why did he claim immunity from answering the question which was asked him by the county attorney as to the 10 cases of whisky previously found in his possession? If appellant and the cab driver were conveying the whisky for a lawful purpose, why was it that the sheriff had to pull his pistol before he could stop the cab and get the whisky? All of these circumstances fully warranted the jury in regarding the testimony offered by appellant as a fabrication, pure and simple. The jury saw these witnesses and heard them testify and were in a much better position to judge of the truthfulness of their statements than are the members of this court. The credibility of the witnesses and the weight of their testimony is always a question exclusively for the jury, and this court will not disturb a verdict where there is any evidence in the record from which the jury could legitimately reach the conclusion that the defendant was guilty. This question has been decided so often that it is not necessary to cite authority in support of it. We are therefore still of the opinion that this court has repeatedly heretofore decided the issues presented contrary to the contention of counsel for appellant.

The third and last proposition submitted in the motion for a rehearing is that misconduct occurring in the jury room while the jury was considering its verdict can be shown by the affidavits or testimony of the jurors. This is not the law in Oklahoma. See Colcord v. Conger, 10 Okla. 460; Petitti v. State, 2 Okla. Cr. 234; Spencer v. State, 5 Okla. Cr. 11; Vandenburg v. State, 6 Okla. Cr. 486;
13 Keith v. State, infra. Every jury is sworn in each case submitted to it to render a true verdict according to the law and the evidence. After a verdict has been rendered and a juror files an affidavit or testifies that he was influenced by anything in arriving at the verdict except the law and testimony, he swears to his own dishonor and stul-ifies and impeaches himself, and he informs the court under oath that he has been guilty of the grossest contempt in ignoring and disregarding the instructions of the court. Instead of being encouraged to file such affidavits or to give such testimony when any such attempt is made the juror should be severely punished for contempt of court. It matters not how any other court in any other state may have decided this question, we are not willing to place the administration of justice in Oklahoma at the mercy of such men. While we dislike to render a judgment which will result in punishment to any human being, yet we cannot avoid the duty imposed upon us to so construe the law as to protect the honest, hard working and law-abiding people of the State. Laws are enacted and courts are established to punish and thereby suppress crime. It is no part of our duty to hunt for excuses to turn guilty men loose. We must seek to protect society and not criminals.

In conclusion we desire to say that we are always ready and willing and anxious to give respectful attention and careful consideration to all questions submitted to us for determination, either on the original submission or on a motion for a rehearing, but we also

desire to say that this court is flooded with briefs, alleged arguments and motions for rehearings, filled with the wildest and most unwarranted statements as to the law and the evidence which are positively and vehemently asserted and plausibly maintained. We cannot decide cases upon these assertions for if we did the rights, property and lives of the people of Oklahoma would be completely at the mercy of the criminal classes. We are therefore compelled to look beneath the surface and carefully examine the records and
14 consider the law and see what foundation, if any, there may be for the propositions submitted. We think that the facts and law in this case are against appellant, and that in his conviction justice simply claimed and marked its own.

The motion for a rehearing is therefore denied, with directions to the clerk of this court to issue the mandate without further delay.

Armstrong and Doyle, Judges, concur.

[Seal Criminal Court of Appeals, State of Oklahoma.]

15 In the Criminal Court of Appeals for the State of Oklahoma.

No. A–307.

CHARLES OVERTON, Appellant,
vs.
STATE OF OKLAHOMA, Appellee.

Your petitioner, Charles Overton, by Stuart, Cruce & Gilbert and Davidson & Williams, his Attorneys, hereby sets forth that on or about April 20th, 1912, the Criminal Court of Appeals for the State of Oklahoma made and entered a final order and judgment herein in favor of the State of Oklahoma and against said Charles Overton, appellant, in which final order and judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of the said Charles Overton, all of which will more in detail appear from the assignment of errors which is filed with this petition.

That the Criminal Court of Appeals of the State of Oklahoma is the highest court of the said State of Oklahoma in which a decision in this suit and this matter could be had.

Wherefore, the said Charles Overton petitions and prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Criminal Court of Appeals for the State of Oklahoma for the correction of errors so complained of, and that a transcript of record and all proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States. And petitioner prays that the judgment of the Criminal Court of Appeals aforesaid be reversed and remanded.

Dated this 20th day of May, A. D. 1912.

DAVIDSON & WILLIAMS,
STUART, CRUCE & GILBERT,
Attorneys for Charles Overton, Appellant.

Filed May 20 1912. W. H. L. Campbell, Clerk.

Endorsed on the back as follows: No. A-307. Charles Overton Appellant vs. State of Oklahoma, Appellee. Petition for A Writ of Error.

16 Filed May 20, 1912. W. H. L. Campbell, Clerk.

In the Criminal Court of Appeals for the State of Oklahoma.

No. A–307.

CHARLES OVERTON, Appellant,
vs.
STATE OF OKLAHOMA, Appellee.

Assignment of Errors.

Now comes Charles Overton, plaintiff in error and appellant, and makes and files this his assignment of errors, and alleges that the following errors occurred in the proceedings and on the hearing of this cause in the Criminal Court of Appeals of the State of Oklahoma:

Assignment of Error No. 1.

That the Criminal Court of Appeals of the State of Oklahoma erred in not holding the conveying portion of Section 4180 of Snyder's Compiled Laws of the State of Oklahoma to be unconstitutional, because said section is a discrimination against interstate purchases, and is in conflict with the interstate commerce clause of the Constitution of the United States and a burden upon interstate commerce in intoxicating liquors. Said portion of Section 4180 being as follows: "It shall be unlawful for any person, individual or corporate, to ship or in any way convey such liquor from one place within this State to another place therein except the conveyance of a lawful purchase as herein authorized;" the lawful purchase so authorized being a purchase from the State.

Assignment of Error No. 2.

The Criminal Court of Appeals of the State of Oklahoma erred in not holding that the plaintiff in error, Charles Overton,
17 had a right to convey an interstate shipment consigned to him from the carrier's place to a place of destination selected by the said Charles Overton, and in not holding that the said Charles Overton was not guilty of any offense against the law in having in his possession intoxicating liquor which was an interstate shipment while the same was being carried from the carrier's place to a place of destination selected by said Charles Overton.

DAVIDSON & WILLIAMS,
STUART, CRUCE & GILBERT,
Attorneys for Charles Overton, Plaintiff in Error.

18 (Endorsed:) No. *No.* A-307. Charles Overton, Plaintiff in Error, vs. State of Oklahoma, Defendant in Error. Assignment of Errors. Stuart, Cruce & Gilbert, 906-12 State National Bank Bldg., Oklahoma City, Okla., Attorneys for Plaintiff in Error.

19 In the Criminal Court of Appeals for the State of Oklahoma.

No. A-307.

CHARLES OVERTON, Appellant,
vs.
STATE OF OKLAHOMA, Appellee.

Bond.

Know all Men by These Presents:

That we, Charles Overton, as principal, and J. T. Taylor and W. B. Green as sureties, are held and firmly bound unto the State of Oklahoma in the sum of $1,000.00 to be paid to the said obligees, their successors, representatives and assigns; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of May, A. D. 1912.

Whereas the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Criminal Court of Appeals for the State of Oklahoma.

Now, Therefore, The condition of this obligation is such that if the above named plaintiff in error, Charles Overton, shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

CHARLES OVERTON.
J. T. TAYLOR.
W. B. GREEN.

A member of the Local Board of Directors of ——.

Attest:

—— ——, *Agent.*

Signed, sealed and delivered in presence of

—— ——.

20 STATE OF OKLAHOMA,
County of Tulsa, ss:

On this 18th day of May, A. D. 1912, personally appeared Charles Overton to me known to be the person described in and who executed

the foregoing bond, and acknowledged that he executed the same as his free act and deed.

[SEAL.] J. P. AVIS,
Notary Public.

My commission expires May 19", 1914.

STATE OF OKLAHOMA,
County of ——, ss:

On this — day of May, A. D. 1912, personally appeared before me —— ——, who, being duly sworn, deposes and says that he is a member of the local board of directors for —— of the ——; that the seal affixed to the foregoing instrument is the cor*cor*porate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and the said —— —— acknowledged said instrument to be the free act and deed of said corporation.

——— ———,
Notary Public.

My commission expires —— —, ——.

STATE OF OKLAHOMA,
County of Tulsa, ss:

T. J. Taylor, being duly sworn, deposes and says: That he is a resident of the State of Oklahoma, and a freeholder therein, and that he is worth the sum of Two Thousand ($2,000.00) Dollars above all debts and liabilities, besides property exempt by law from execution.

J. T. TAYLOR.

Subscribed and sworn to before me this the 18th day of May A. D. 1912.

[SEAL.] J. P. AVIS,
Notary Public.

My commission expires May 19, 1914.

21 STATE OF OKLAHOMA,
County of Tulsa, ss:

W. B. Green, being duly sworn, deposes and says: That he is a resident of the State of Oklahoma, and a freeholder therein, and that he is worth the sum of Two Thousand ($2,000.00) Dollars, above all debts and liabilities, besides property exempt by law from execution.

W. B. GREEN.

Subscribed and sworn to before me this the 18th day of May A. D. 1912.

[SEAL.] J. P. AVIS,
Notary Public.

My commission expires May 19, 1914.

I hereby approve the foregoing bond and sureties this 20 day of May, A. D. 1912.

HENRY M. FURMAN,
Presiding Judge of the Criminal Court of Appeals for the State of Oklahoma.

Attest:

W. H. L. CAMPBELL. [SEAL.]
Clerk of the Criminal Court of Appeals of the State of Oklahoma.
By JESSIE PARDOE, *Deputy.*

Filed May 20, 1912. W. H. L. Campbell, Clerk.

Endorsed on the back as follows: No. A-307. Charles Overton, Appellant, vs. State of Oklahoma, Appellee. Bond.

22 Filed May 20, 1912. W. H. L. Campbell, Clerk.

In the United States Supreme Court of the United States of America.

THE UNITED STATES OF AMERICA,
State of Oklahoma, ss:

The President of the United States to the Honorable Judges and Clerk of the Criminal Court of Appeals for the State of Oklahoma, Greeting:

Because in the record of the proceedings as also in the rendition of the judgment, of a plea which is in said Criminal Court of Appeals of the State of Oklahoma, before you, being the highest court of law and equity of the said State in which a decision can be had in the said suit between Charles Overton, as plaintiff in error in the Criminal Court of Appeals of the State of Okahoma, and State of Oklahoma, as defendant in error in the Criminal Court of Appeals of the State of Oklahoma, and in a judgment rendered in said cause in favor of the said defendant in error and against the plaintiff in error affirming the judgment of the court below and dismissing the action of the plaintiff in error against the said defendant in error and adjudging that the said plaintiff in error take nothing by his petition in error and appeal and affirming in all things the judgment of the lower court in favor of the defendant in error, or appellee, at cost of plaintiff in error, or appellant; and, because it appears therein that manifest error hath happened to the great damage of said plaintiff in error, Charles Overton, as by his petition in error and assignment of errors appears, we being willing that the error, if any hath been committed, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do com-

23 mand you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings, aforesaid, with all things concerning the same, duly authenticated and verified, to the Supreme Court of the United States,

together with this writ, so that you have the same at Washingon at the said Supreme Court within thirty days of the date hereof that said records of proceedings aforesaid being inspected by the Supreme Court it may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Henry M. Furman, Presiding Judge of the said Criminal Court of Appeals, this 20th day of May, A. D. 1912, and the Year of the Independence of the United States of America the One Hundred and Thirty-sixth.

Allowed.

HENRY M. FURMAN,
Presiding Judge of the Criminal Court of Appeals of the State of Oklahoma.

Attest:

[Seal Criminal Court of Appeals, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Criminal Court of Appeals of the State of Oklahoma,
By JESSIE PARDOE, *Deputy.*

24 [Endorsed:] Comp. No. A-307. Charles Overton, Appellant, vs. State of Oklahoma, Appellee. Writ of Error. Stuart, Cruce & Gilbert 906-12 State National Bank B'ld'g, Oklahoma City, Okla.

25 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of Oklahoma, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., in thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Criminal Court of Appeals for the State of Oklahoma wherein Charles Overton is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Presiding Judge of the Criminal Court of Appeals of the State of Oklahoma this 26 day of May, 1912.

HENRY M. FURMAN,
Presiding Judge of the Criminal Court of Appeals for the State of Oklahoma.

Attest:

[Seal Criminal Court of Appeals, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Criminal Court of Appeals for the State of Oklahoma,
By JESSIE PARDOE, *Deputy.*

OKLAHOMA CITY, OKLAHOMA, *May 28th*, 1912.

I, attorney of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the Unitd States.

CHARLES WEST, *Att'y Gen'l.*,
Attorney for the State of Oklahoma.

26 [Endorsed:] No. A-307. Charles Overton, Plaintiff in Error, vs. State of Oklahoma, Defendant in Error. Citation. Filed Jun- 3, 1912. W. H. L. Campbell, Clerk.

27 & 28 In the Criminal Court of Appeals for the State of Oklahoma.

No. A-307.

CHARLES OVERTON, Plaintiff in Error,
vs.
STATE OF OKLAHOMA, Defendant in Error.

Supersedeas Order.

This cause coming on to be heard on this the 20th day of May, A. D. 1912, upon the application of the plaintiff in error, Charles Overton, for a writ of error to the Supreme Court of the United States, and an order of supersedeas, and the same having duly considered:

It is hereby ordered that the application for supersedeas be and the same is hereby allowed, and the judgment of the said Criminal Court of Appeals of the State of Oklahoma is hereby suspended and the Clerk of said Court is hereby directed to stay the mandate of the Criminal Court of Appeals to the County Court of Tulsa County until the decision of the Supreme Court of the United States upon said writ of error, and the further order of this Court.

HENRY M. FURMAN,
Presiding Judge of the Criminal Court of Appeals of the State of Oklahoma.

Attest:

W. H. L. CAMPBELL, [SEAL.]
Clerk of Criminal Court of Appeals of State of Oklahoma,

By JESSIE PARDOE, *Deputy.*

Filed May 20, 1912. W. H. L. Campbell, Clerk.

Endorsed on the back as follows: No. A-307. Charles Overton, Plaintiff in Error, vs. State of Oklahoma, Defendant in Error. Supersedeas Order.

29 (Filed September 16, 1909.)

In the Criminal Court of Appeals of the State of Oklahoma.

#A-307.

CHARLIE OVERTON, Plaintiff in Error,
vs.
STATE OF OKLAHOMA, Defendant in Error.

Petition in Error.

For his petition in error in this case, the plaintiff in error, Charlie Overton, alleges that by the consideration of the county court of Tulsa County, Oklahoma, in an action there pending, wherein the State of Oklahoma was plaintiff, and the said Charlie Overton and one Mitchell, whose first name is unknown, were defendants, the said plaintiff, defendant in error, recovered a judgment against this plaintiff in error on the 16th day of Sept., 1908, whereby this plaintiff in error was adjudged to pay a fine of One Hundred ($100) Dollars, and be imprisoned in the county jail for the period of sixty days; and this plaintiff in error alleges that there is manifest error in said judgment and determination of said court, in the following particulars, to-wit:

First. The court erred in giving instructions numbered nine and ten, given by the court on his own motion.

Second. The court erred in overruling the motion of plaintiff in error for a new trial.

30 The original case made in said cause in the county court of Tulsa County, Oklahoma, is hereto attached marked "Exhibit A," and made part hereof.

Wherefore, plaintiff prays that the said judgment and sentence of the court be set aside and reversed, and that plaintiff in error recover for cost, and that he have such other and further relief as is consistent with the practice of the court.

(Signed) BIDDISON & CAMPBELL,
Attorneys for Plaintiff in Error.

31 "EXHIBIT A."

In the County Court of Tulsa County, Oklahoma.

STATE OF OKLAHOMA, Plaintiff,
vs.
CHARLIE OVERTON and One MITCHELL, Whose First Name is Unknown, Defendants.

Case-Made.

Be it remembered that on July 1st, 1908, M. A. Breckenridge, County Attorney of the above named County, filed in the above entitled Court and cause, the certain information which is in words and figures as follows, to wit:

"EXHIBIT A."

Complaint.

STATE OF OKLAHOMA,
Tulsa County, ss:

J. J. Moran of lawful age, being duly sworn, on oath, says: That Charlie Overton & one Mitchell, whose — the 1st day of July, 1908, in the County of Tulsa, in the State of Oklahoma, then and there being, did then and there unlawfully, convey from one place within this State to another place therein, to-wit, from North Elgin and Brady Streets, to the Frisco right-of-way and Elgin Street in the City of Tulsa, intoxicating liquors, to-wit, 96 one-half pints of whiskey; said Charlie Overton and one Mitchell *out* being then and there authorized by the laws of the State of Oklahoma to convey said intoxicating liquors. Contrary to the form of the
32 statute in such cases made and provided, and against the peace and dignity of the State of Oklahoma.

J. J. MORAN.

Subscribed and sworn to before*me* me this 1st day of July, 1908.

N. J. GUBSER,
County Judge.

(Endorsed:) State of Oklahoma, vs. Charlie Overton and One Mitchell. County Court Tulsa Co. Okla. Filed Jul- 1-1908. G. W. Davis, Clerk.

In the County Court, Before N. J. Gubser, County Judge in and for Tulsa County, State of Oklahoma.

STATE OF OKLAHOMA, Pl'ff,
vs.
CHARLIE OVERTON and One MITCHELL, Whose First Name is Unknown, Def't-.

Conveying Liquor.

Information.

Be it remembered, that M. A. Breckenridge, County Attorney in and for Tulsa County, State of Oklahoma, who prosecutes in the name and by the authority of the State of Oklahoma, comes here in person into the County Court of said County this 1st day of July A. D., 1908, and upon the affidavit of J. J. Moran duly subscribed and sworn to by him as provided by law, and the same is hereto attached marked "Exhibit A" and made a part hereof gives the Court to understand and be informed that on the 1st of July A. D., 1908, in Tulsa County, State of Oklahoma Charlie Overton and one

Mitchell, whose first name is unknown late of said County
33 and within the jurisdiction of this Court, did unlawfully convey from one place within this State to another place therein, to-wit, from North Elgin and Brady Streets to the Frisco right-of-way and Elgin Street in the city of Tulsa, intoxicating liquors, to-wit: 96 one-half pints of whiskey; said Charlie Overton and one Mitchell not being then and there authorized by the laws of the State of Oklahoma to convey said intoxicating liquors, and said intoxicating liquors so conveyed not being of a lawful purchase, as provided by the laws of the State of Oklahoma.

Contrary to the form of the Statute in such case made and provided — against the peace and dignity of the State of Oklahoma.

M. A. BRECKENRIDGE,
County Attorney.

STATE OF OKLAHOMA,
Tulsa County, ss:

Personally appeared before me N. J. Gubser, County Judge in and for Tulsa County, State of Oklahoma, M. A. Breckenridge, of lawful age, who being duly sworn upon oath deposes and says, that he is the County Attorney of said County, that he has read the foregoing information and knows the contents thereof, and from his best information and belief, the facts and allegations therein contained are true.

Subscribed and sworn to before me this 1st day of July, 1908.

N. J. GUBSER,
County Judge of Said County.

(Endorsed:) State of Oklahoma vs. Charlie Overton & one
34 Mitchell. Information for conveying liquor. Names of Witnesses, J. J. Moran, Sam Walker. County Court Tulsa Co., Okla. Filed Jul- 1, 1908. G. W. Davis, Clerk. M. A. Brencinridge, County Attorney, Tulsa County, Okla."

Upon which said information and complaint a warrant was by the Judge of said Court duly issued and placed in the hands of the Sheriff of said County for service, and that on said day the said Sheriff served and executed said warrant, taking the said defendants and each of them into custody and producing their bodies before said Court, at which time they were by said Court admitted to bail, and each furnishing bail with sufficient surety they were discharged pending their trial. And thereafter such proceedings were had in said cause, the said defendants and each of them being duly arraigned and thereupon such further proceedings in said cause had. That the same was duly set and came on for trial on the 28th day of August, 1908, before said Court, and the Honorable N. J. Gubser, Judge thereof, with a jury consisting of R. F. Morley, C. C. Berry, C. R. Aubrey, George Williamson, H. C. Green and W. A. Watts, which said jury was duly sworn and empanneled. Thereupon the said County Attorney stated the said cause to the jury with the plea of the defendant-, and the plaintiff then introduced its evidence, and

the defendants introduced their evidence, and both parties rested the cause, and all the said evidence is in words and figures as follows, the same being the official transcript of the official stenographer of said court, to-wit:

35 In the County Court of Tulsa County, State of Oklahoma.

Criminal, No. 342.

STATE OF OKLAHOMA
vs.
CHARLEY OVERTON and CLYDE MITCHELL.

Conveying Liquor.

Appearances:

For the State: County Attorney, M. A. Breckenridge.
For the Defendant: Messrs. Biddison, Campbell & Eagleton.

36 JOHN MORAN, being first duly sworn upon his oath in behalf of the state, was the first witness called, and testified as follows:

Direct examination—Mr. BRECKENRIDGE:

Q. State your name?
A. J. J. Moran.
Q. Mr. Moran are you a Deputy Sheriff?
A. Yes sir.
Q. Tulsa County?
A. Yes sir.
Q. Were you on the first day of July, 1908?
A. Yes sir.
Q. Do you know the defendants, Charley Overton and Clyde Mitchell?
A. Yes sir.
Q. Do you recall seeing the defendants or either of them on the first day of July, 1908?
A. Yes sir.
Q. When was the first time on that date that you saw them?
A. About 2 o'clock in the morning, or very near 2 o'clock.
Q. Was anyone with you at the time you saw them?
A. Yes sir; Sam Walker.
Q. Is he a policeman?
A. Yes sir.
Q. Whereabouts, Mr. Moran, did you first see them?
A. On Elgin St., where it crosses the Frisco Railroad, right on the railroad.
Q. What were they doing?

37 A. They were driving from the north in a cab; Mr. Mitchell was driving and Mr. Overton was inside in the cab.

Q. Where did you say that was?
A. At the crossing of the Frisco Railroad on Elgin St.
Q. In Tulsa?
A. City of Tulsa.
Q. Well, what took place when you saw them driving along?
A. We saw the lights of the cab a block or so north of the crossing and came on down and called to them to stop; and they didn't stop the first time we called to them; and I reached for my gun the third time and Mitchell saw the gun and stopped. I went up to the cab and looked in and Mr. Overton made the remark: "You ain't going to shoot are you"? and I says "No". And I put the gun up and looked in and there was some sacks inside of the cab and I asked him what it was and I don't remember his exact answer. I reached for the sacks and there was bottles in the sacks and Mr. Walker stepped up and looked in. And I asked him if he wanted to go up to the jail with me——
Q. Who was that?
A. Mr. Walker; and he said no. I took the sacks out of the cab and put them in the jail, and left them there inside of the jail and let Mr. Mitchell and Mr. Overton go.
Q. Was there more than one sack?
A. No sir, just one sack.
Q. What was in the sack?
A. There was 94 full half-pint bottles of Shawhan whiskey; or bottles labeled Shawhan Whiskey, and two broken bottles.
Q. Could you smell the odor of the contents of the two broken bottles?
A. Yes sir.
38 Q. What did it smell like?
A. It smelled like whiskey.
Q. What year was that?
A. This year; 1908.
Q. When they drove up to the crossing was there a light there?
A. Light at the crossing?
Q. Yes.
A. No sir.
Q. Did you tell them who you were when you first told them to stop?
A. Don't think I did; just called to them.
Q. Did you call loud enough for them to hear?
A. Yes sir.
Q. Could they see you?
A. Yes sir. There was a light on the corner south there.
Q. You knew Mr. Overton before?
A. Yes sir.
Q. He knew you, did he?
A. Yes sir.

Cross-examination—Mr. BIDDISON:

Q. Mr. Moran what direction was this cab going?
A. It was going south.

Q. Where was it when you first saw it?
A. I could see the lights a block or a block and a half north of the railroad.
Q. Where is this railroad crossing that you spoke about, where you stopped.
A. It's on Elgin St. It's at the east end of the freight depot platform; Frisco Depot.
39 Q. What direction from here?
A. North-east.
Q. It is how many blocks east from Main St.
A. Four.
Q. Right up the Frisco Railroad?
A. Yes Sir.
Q. That is the crossing at which you stopped them?
A. Yes sir.
Q. And they were coming from the north there?
A. Yes sir.
Q. You saw them about a block away?
A. Yes sir.
Q. Do you know where the Katy depot is in this town?
A. Yes sir.
Q. Were they coming from that direction?
A. Might have been.
Q. Were they coming from that direction?
A. Yes sir.
Q. Who was on the driver's seat?
A. Mr. Mitchell.
Q. Where was Mr. Overton?
A. Overton was in the cab.
Q. This whiskey was in the cab?
A. Yes sir.
Q. In a sack?
A. Yes sir.
Q. Two sacks wasn't it?
A. No sir; only one sack.
Q. 94 half-pints and two broken half-pints?
A. Yes sir.
40 Q. The bottle*d*, that is, of two broken half-pints?
A. Yes sir.
Q. The bottle*d* had the Government Revenue stamp on them?
A. I don't remember. They were branded; didn't notice whether it was the Government brand or not.

Redirect examination—Mr. BRECKENRIDGE:

Q. Mr. Moran, is the Katy Depot on Elgin St.?
A. No sir.
Q. What street is it on?
A. It is between Main Street and Boston.
Q. Then what comes after Boston?
A. Cincinnati.
Q. Then what after Cincinntai?

A. Detroit.
Q. What after Detroit?
A. Elgin.
Q. What street did you say they come down from?
A. Elgin.
Q. How was this sack fixed up?
A. The bottles were just loose in the sack; the top of the sack was tied.
Q. Do you remember how it was tied?
A. Some kind of a knot.
Q. Did the sack make any noise?
A. Yes sir.
Q. Rattled would they like bottled stuff?
A. Yes sir.

Recross-examination—Mr. BIDDISON:

Q. Tell us a little more fully what transpired at the time you stopped these men out here in the road?
41 A. In what way?
Q. I want to know what happened there?
A. I think I have told about all that happened.
Q. Tell it again.
A. The cab came from the north there and Mr. Walker and I went together from the west on the Frisco Right of way and we waited until they came up and I called the second or third time and when they didn't stop the first time I reached for my gun. And Mr. Mitchell stopped that time and I looked in the cab where Mr. Overton was and asked him the question what he had; I don't remember what answer he made, but I put my hands on the sack and felt these bottles, and asked Mr. Walker to look in the cab and he looked in. I asked him if he wanted to ride up to the jail and he said "No, I guess not."
Q. Is that all the conversation you had with Overton?
A. I don't remember; I asked him the question what he had, and Mr. Overton made the remark that he had whiskey and was taking it home.
Q. You don't know where they had come from?
A. No sir.
Q. Don't know where they was going to, only what he said?
A. No sir.
Q. How far were they from you when you hollowed to them to stop the first time?
A. I think the horses' heads were just even.
Q. You were only about 10 or 15 feet from the driver?
A. Not that far.
Q. You spoke to them about the time the horses' heads were even?
A. Yes sir.
42 Q. How far did he drive before he stopped?
A. He drove probably 20 or 30 feet before he stopped.
Q. What sort of a gait was he going?
A. In a trot.

Q. He went about 30 feet before he stopped?
A. Yes sir.

Mr. BRECKENRIDGE:

Q. Did he attempt to stop the first time?
A. No sir.
Q. He did not attempt to stop until he saw the gun?
A. Not until he saw the gun; he looked back over his shoulder.

Mr. BIDDISON:

Q. Is that the first time he looked back over his shoulder?
A. I wouldn't say for sure, because I don't know.

SAM WALKER, being duly sworn on his oath on behalf of the state testified as follows:

Direct examination—Mr. BRECKENRIDGE:

Q. State your name?
A. Walker's my name.
Q. What is your given name?
A. Sam Walker.
Q. Are you a policeman?
A. Yes sir.
Q. Were you one on the night of the 1st of August—on the morning of the first of August?
A. I think so, yes sir.
Q. Do you know John J. Moran?
A. Yes sir.
43 Q. Do you know Charley Overton?
A. Yes sir.
Q. Do you know Mitchell?
A. Yes sir.
Q. Did you see these parties on that day?
A. I don't remember for sure about the date; I remember seeing them one morning when Mr. Moran and I were together.
Q. Where were you when you saw them?
A. On Elgin Ave.
Q. What time of the night?
A. After 12 o'clock I think; at night at least.
Q. Where abouts did you say you were when you saw them?
A. On Elgin Ave.
Q. Where were they?
A. On Elgin Ave.
Q. How far were they from you when you first saw them?
A. Possibly a block or two blocks.
Q. How were they—afoot?
A. In a cab.
Q. A cab?
A. Yes sir.
Q. Did they come towards you?
A. Yes sir.

Q. What did they do then?

A. Mr. Moran and I were standing there. Seen this cab coming and he remarked to me "Let's wait here and see what this cab has and they drove up to us and he hollowed to them. And Mr. Moran walked up and looked into the cab and Mr. Overton was in the cab and Mr. Mitchell was on top. And I walked up there and
44 John he asked me if I wanted to go up to the jail and I said "Yes; I will walk up there, it is only a short distance."

Q. Did you see in the cab?

A. Yes sir.

Q. What was in the cab?

A. A sack was all I seen.

Q. Did you come up to the jail?

A. Yes sir.

Q. Did you see anything after you got to the jail?

A. Yes sir I seen the sack; but Mr. Moran had unloaded what was in the cab when I got up there; didn't get up there in time to see it unloaded.

Mr. MORAN recalled.

Mr. BRECKENRIDGE:

Q. Mr. Moran, I will ask you what was done with the 94 half-pints of liquor that was seized that night?

Objected to by Mr. Biddison, as irrelevant and immaterial.

Q. I will ask you do you know where that whiskey is at this time?

A. At this time?

Q. Yes sir.

A. Why, no sir, I don't.

Q. Do you know what became of it?

A. I know what we did with it.

Mr. BIDDISON: To that we object as irrelevant and immaterial. Attorney for defendant states that they are not denying that it is whiskey—96 one-half pints of whiskey in bottles. There isn't any question about that.

45 Q. Mr. Moran, did you see on any of those bottles any labels or any——

Attorney for defendant states that they didn't buy the whiskey from any dispensary, or from any agent. Plaintiff rests and this is all the evidence introduced by plaintiff.

CHARLEY OVERTON, being first duly sworn upon his oath on behalf of defendants testified as follows:

Direct examination—Mr. BIDDISON:

Q. You are the man who had this liquor seized by Mr. Moran, one of the defendants in this case?

A. Yes sir.

Q. Where did you get that whiskey?
A. Bought it from Morrin-Powers Mercantile Co., Kansas City, Mo.
Q. In what way had it been shipped here, do you know?
A. Shipped here in cases to me by freight.
Q. Over what railroad?
A. M., K. & T.
Q. Where had you got it, or rather in whose possession was it at the time it was seized?
A. My possession.
Q. Where did you get it?
A. At the Katy Depot.
Q. From which it had been shipped from Kansas City, Mo.?
A. Yes sir.
Q. Have you the freight bills and the bills of the original purchase?
A. Yes sir.
Q. Produce them. (Witness produces them.)
Q. Mr. Overton when did you get this shipment?
46 A. I got it out of the depot the night of June 30th.
Q. How long before it was seized?
A. Ten minutes; just from driving from the depot.
Q. You were driving from the depot at that time?
A. Yes sir.
Q. It had just been delivered to you?
A. Yes sir.
Q. It had just been delivered to you?
A. Yes sir.
Q. Where were you going?
A. Home.
Q. Taking this there with you?
A. Yes sir.
Q. I will ask you to examine defendant's Exhibit "A." State what that is. (Hands witness paper.)
A. That is a bill from Morrin-Powers Company.

(Hands witness another paper.)

Q. Is that the receipt for these goods marked paid?
A. Yes sir.

Mr. BRECKENRIDGE: I wish to object to the introduction of the defendant's "Exhibit A" for the reason that it is not property connected with the 96 one-half pints of whiskey which were captured on the morning of July 1, 1908; as defendant's exhibit "A" shows that there were two cases of Shawhan one-half pints and the evidence shows that the property seized by the officers was not in case lot but in a sack.

Q. Mr. Overton is this the bill of that identical goods?
A. Yes sir.
Q. In what form was it shipped?
A. Cases.

Q. In what condition did these cases arrive here?
A. They were tore up; the bottom and top was both off; the contents were taken out and placed in this sack.
47 Q. And this is the bill of that identical whiskey that you had that night?
A. Yes, sir.

Mr. BRECKENRIDGE: I want to object to it now as being incompetent, irrelevant and immaterial; as having no tendency to prove or disprove any material allegations in this case.
COURT: Objection overruled.
State excepts.

Q. I will ask you to examine defendant's exhibit B and state what that is?
A. Expense bill from the Mo. K. & T. Ry. Co.
Q. That is the freight bill?
A. Yes, sir.
Q. For what property is that the freight bill?
A. Two cases of whiskey.
Q. This same two cases of whiskey?
A. Yes, sir.
Q. That was given to you for this by the Ry. Co.?
A. Yes, sir.
Q. Is that the receipt or is it just the bill?
A. They call it a freight bill; this part's the expense bill. There is two parts to this.

Mr. BIDDISON: We offer in evidence Defendant's exhibit "B."
Mr. BRECKENRIDGE: I wish to object to the introduction of this expense bill. First: For the reason that it is incompetent, irrelevant and immaterial and for the further reason that the date shown by this expense bill—6/27/08—which would be two days prior to the time of the alleged taking out of two cases of whiskey from the Katy Depot by the defendant, Charley Overton and is therefore not connected with the issue in fact at all.
48 COURT: The objection is overruled with the understanding that attorney for the defendant further identify this by some representative of the M. K. & T. Ry. Co.

Cross-examination—Mr. BRECKENRIDGE:

Q. What is that Consignee's name down there?
A. You will excuse me for giving expert testimony, but all of those freight shipments are signed by some transfer Company; I couldn't tell you exactly who that is.
Q. Just a company is it? It isn't Morrin-Powers Mercantile Co. is it?
A. I can't tell.
Q. Does H. C. stand for that?
A. I can't make out what that is. I don't know as it is H. C. Take a railroad man he usually makes his——

Q. Mr. Overton, did you have any other shipments at the M. K. & T. depot at this time?

Mr. BIDDISON: To that we object as irrelevant and immaterial. There is only one in controversy here.

COURT: Objection overruled.

Exception.

Q. Did you have any other shipments at the M. K. & T. Deport at about this time?

A. I don't remember whether I had any more there or not.

Q. You don't remember?

A. No sir; I don't believe I do.

Q. To refresh your memory a little—all I want is your answer yes or no.

A. I couldn't state positively to save my soul.

Q. Have you been in the habit of getting shipments——

49 Mr. BIDDISON: To that we object as immaterial.

COURT: Objection overruled.

Exception.

A. Yes, I have had whiskey shipped in before.

Q. Shipped in over the Katy?

A. Yes, sir.

Q. Along about this time?

A. I don't remember.

Q. From these same people?

A. Morrin-Powers?

Q. Yes.

A. I couldn't say to that.

Q. Who put that two cases of whiskey in that sack?

A. I did.

Q. What made you go over there after it at *at* one or two o'clock at night?

A. Because you couldn't haul it in the day-time.

Q. Who gave it to you?

A. The freight-house foreman. His name is Carter.

Q. That man sitting there?

A. Yes sir.

Q. Where did you find him?

A. In bed.

Q. And you went over and pulled him out of bed to go over there and get that shipment?

A. Yes sir.

Q. What time was it?

A. Between one and two o'clock.

Q. How much was there?

A. Two cases.

50 Q. Two cases?

A. Yes sir; 96 half pints.

Q. Mr. Overton, you say you were taking this home?

A. Yes sir.

Q. What were you going to do with that 10 cases of whiskey that the officers caught you with on the 20th of June?

Mr. BIDDISON: To that we object as being highly prejudicial and assuming a fact not in evidence, and it isn't proper cross-examination.

COURT: Objection overruled.

Exception.

Mr. BIDDISON: The defendant declines to answer the question for the reason that the purpose of the question is to cause this defendant to incriminate himself in another case for which the state is prosecuting this defendant for burglary. And the defendant declines to answer for that reason. The Court knows that this case is pending. The court knows that the plaintiff has been bound over.

Mr. BRECKENRIDGE: I submit that that does not incriminate him. If in proving motive or rational explanation of any transaction, if it does bring into consideration some other crime that he might be prosecuted for, that would not keep him from answering it.

The COURT: Did you hear the question, Mr. Overton?

A. Yes sir.

—. Do you refuse to answer it?

A. Yes sir.

Mr. BRECKENRIDGE: If the court please, I desire to have an answer.

Mr. BIDDISON:

Q. Was your reason for refusing to answer, the reason I have stated to the Court?

A. Yes sir.

51 Mr. BIDDISON: Defendant refuses to answer because the evidence might incriminate him.

Mr. BRECKENRIDGE:

A. Mr. Overton, to whom did you pay this $18.90?

A. To whom?

Q. Yes.

A. Morrin-Powers Mercantile Company.

Q. Did you pay it by check or how?

A. I was thinking about that awhile ago; and I can't remember.

Q. Did you pay it at this end of the line or at that end of the line?

A. I sent a letter; I don't know whether I sent a check or post office order, or what. I mailed it to them.

Q. What day did you mail it to them?

A. I don't remember that either.

Q. Who did you get that expense bill from?

A. E. Leachman.

Q. That expense bill shows it was paid on the 27th doesn't it?

A. No, it don't show it is paid at all.

Q. What is that out there? (Indicating writing on paper.)

A. That shows the freight was paid.
Q. How did that shipment come?
A. By the Katy Railroad.
Q. Did you pay for it C. O. D. or how?
A. I couldn't get it shipped C. O. D. by freight.
Q. At the time of ordering this goods did you send the check along with the order, or afterwards?
A. I couldn't say; no I don't think I did.
52 Q. Did you pay for it before you got it out *of* afterwards?
A. Afterwards.
Q. How long?
A. I don't know I tell you.
Q. Had the goods come to the depot here before you paid for it?
A. I don't know I couldn't say.
Q. This expense bill is dated 6/27/08?
A. Yes sir.
Q. What does that mean?
A. That means that the freight arrived on the 6th month, 27th day of the year 1908. I think that is what it means; I am not an expert.
Q. When was that expense bill delivered to you?
A. On the afternoon of the 30th.
Q. You paid the freight then on the 30th?
A. No, the freight was prepaid.
Q. But it was delivered to you on the evening of the 30th?
A. The expense bill, you mean?
Q. Yes.
A. No sir.
Q. What time in the evening?
A. Between noon and five o'clock sometime.
Q. Who delivered it to you?
A. E. Leachman.
Q. Did you go over there after it?
A. Yes sir.
Q. And then after that was delivered to you—that expense bill from Mr. Leachman—you didn't go back to get the goods until 1 or 2 o'clock that night?
A. Yes sir.
Q. You did not get the expense bill in the afternoon?
A. You bet you I did.
53 Q. What did you say when you got this expense bill from Mr. Leachman?

Mr. BIDDISON: Objected to as irrelevant and immaterial.
COURT: Objection overruled.
Exception.

A. I couldn't answer the question.
Q. Why was the goods left there?
A. Because he didn't want to move them I suppose.
Q. Why didn't you go over there in the afternoon and get the goods?

A. You have to present the expense bill to the platform man before you can get the goods, always.

Q. That is all the claim that the railroad company has against you is it not?

A. I don't know that they ever did have any claim against me for the goods.

Q. Have they any claim against the goods when the expense bill is delivered to you?

A. I don't know?

Mr. BIDDISON: To that we object, calling for a question of law.

COURT: Objection sustained.

Q. And you say you got that on the 29th?

A. No on the 30th.

Q. On the 30th?

A. You bet you.

Q. You didn't pay for the goods until after they arrived here did you?

Mr. BIDDISON: To that we object as having been asked and answered three times.

COURT: Objection overruled.

Exception.

54 A. I told you before no; I don't know when they arrived.

Q. That bill shows they were paid on the 29th of June, 1908?

A. Yes sir.

Q. And it was on the following day that you went over there in the afternoon and got this expense bill?

A. It was on the 30th.

Q. Then you went back at night and got the goods?

A. Yes sir.

Q. Now, Mr. Overton, I am going to ask you again if you can remember of having received other shipments of like character to this over the Katy Railroad at Tulsa, along about the time—June 29th—or 30th——?

Mr. BIDDISON: Objected to as irrelevant, immaterial and having been asked and answered twice.

COURT: Objection overruled.

Exception.

A. I don't think I did. I don't remember exactly.

Q. How many bottles were in these two cases?

A. Ninety-six.

Q. What was the brand?

A. Shawhan.

Q. Where did you find the cabman?

A. I went to the barn and got him.

Q. What hour when you went and got him?

A. Between 12 and 2 o'clock.

Q. What did you tell him you wanted him for?

A. I don't believe I told him.

Q. What did he do after he drove you up there?
A. He stopped.
Q. Did he see you put that bag of stuff in the cab?
55 A. I suppose he did. He was setting there where he could see.
Q. He saw you get it out of the depot?
A. I couldn't say; I don't hardly think he did.
Q. Had you ever been notified by the railroad company that this goods had come in there?
A. No; I think I beat them to it.
Q. You went over there and enquired about it and they told you it was there?
A. Yes sir.
Q. You asked for the expense bill at that time did you?
A. Yes sir.
Q. The freight was prepaid?
A. Yes sir.
Q. Where does this Carter live?
A. He rooms right across the track there from the depot. Right on the corner; I think it used to be a restaurant.
Q. Are you in the habit of getting up the plat-form freight people in the middle of the night to get out goods?

Mr. BIDDISON: Objected to as it is immaterial as to his habits.
COURT: Objection overruled.
Exception.

A. No sir.
Q. That is the first time you ever did that?
A. Yes sir it is the first time I ever woke him up.
Q. Where did you go after you got the two cases up at the depot?
A. I started home, and finally got there.
Q. Where did the officers take hold of you?
A. At the crossing of the Frisco and Elgin.
56 Q. How many blocks had you travelled?
A. I would have to have a map to tell you that.
Q. What street is the depot on?
A. In the neighborhood of eight or ten blocks or something like that.

Mr. BIDDISON:

Q. Where is your home?
A. I live at 804——
Q. What direction from the Katy Depot?
A. Southeast from the Katy depot.
Q. And you were southeast of the Katy depot when you were stopped?
A. Yes sir.
Q. Coming from the direction of your home?
A. Yes sir just as straight as I could go.
Q. You say Mr. Mitchell was sitting on his cab while you were in the depot?
A. Yes sir.

Q. Did you tell him what you had?
A. No sir.
Q. Did he have any means of knowing what you had?
A. No sir.
Q. The sack wasn't open?
A. No sir.
Q. You just carried it out and put it in the cab?
A. Yes sir.

57 Mr. BRECKENRIDGE:

Q. Where was those two bottles that were broken?
A. I never knew there was any broken.
Q. There were 99 one-half pints?
A. Yes sir.
Q. Whole; none broken at all?
A. No sir.
Q. You put these two cases in a sack did you?
A. Two sacks.
Q. Two sacks then were there?
A. Yes sir.
Q. How did you take them to the wagon?
A. Carried them.
Q. On your back?
A. No sir in my arms.
Q. Who opened the door?
A. I opened it when I got out; it was open.
Q. You just put those sacks in?
A. Yes sir.
Q. Didn't make any noise like bottles did it?
A. I never noticed any.
Q. Could Mitchell hear any noise of those bottles rattling together?
A. I think not.
Q. They weren't wrapped up were they?
A. No sir.
Q. You don't think the two sacks full of bottles there could be heard by the man sitting on the cab?
A. I don't think he heard them.

58 Q. Where did you get the sacks from?
A. I got them out of the cab.
Q. Did you tell him what you were taking those sacks for?
A. I didn't take them up.
Q. Who took them up there?
A. Suppose Mitchell did.
Q. What did he take them up there for?
A. I don't know.
Q. Didn't you know before that time that those two cases of whiskey were in a bad shape?
A. I did.
Q. What did you say when you found those sacks in there?
A. I never found them.

Q. Who found them.
A. Mitchell.
Q. What did he say?
A. I asked him if he had any sacks; he said "Yes, here's some."
Q. Did you tell him what you wanted with them?
A. No.
Q. He didn't ask you?
A. No.
Q. When did you decide that you would put them in sacks?
A. When I tried to lift them. They wouldn't stay in the box; the expense bill said they were in bad shape. But I didn't think I couldn't carry them.
Q. Did you look at the cases when you were at the depot?
A. No sir.
59 Q. Do you mean to say that it was just as an accident that this cabman had those two sacks up there?
A. You will have to ask him. I knew nothing about that.

FRANK CARTER, being first duly sworn upon oath on behalf of defendant testified as follows:

Direct examination—Mr. BIDDISON:

Q. Where do you reside?
A. I am working here in Tulsa.
Q. In what business are you engaged?
A. Yard Clerk at the Frisco at the present time.
Q. Have you heretofore been connected with the Missouri, Kansas & Texas Ry. Co., in this City?
A. Yes sir; worked for them a year and a half.
Q. In what capacity?
A. Warehouse foreman.
Q. I will ask you to examine defendant's exhibit B, which I hand you.
Q. When did you first see this?
A. About the night of June 30th.
Q. Where?
A. Mr. Overton handed it to me.
Q. Did you deliver the goods on that?
A. Yes sir.
Q. I will ask you if you know what these dates on here refer to—6/27 and 6/25?
A. The first date you mention—6/27 is the day this expense bill was made out and the other date 6/25 is the date the way-bill was made in Kansas City.

60 Cross-examination—Mr. BRECKENRIDGE:

Q. Then the goods got here on the 27th?
A. Either on the morning of the 27th or the evening of the 26th; the expense bill is usually made out on the day following the arrival of the goods.

Q. How long after the goods arrived before you notified the consignee?

A. We hardly ever notify them before two or three days. No special time.

Q. What time of day or night was it when Mr. Overton presented that expense bill to you?

A. I couldn't say; it must have been between 2 and 3.

Q. Where were you?

A. I was over to the rooming house asleep.

Q. Is it a habit of yours to get up and go over there and get out shipments after you have gone to bed?

A. Only when I am called.

Q. Do you go when you are called?

A. Not unless it is worth while.

Q. Do you think it is worth while for two cases of whiskey?

A. Not any more so than anything else.

Q. Did you deliver any other goods along about that time to Mr. Overton?

A. No sir I never did.

Q. They went through your hands?

A. These two cases passed through my hands, yes sir.

Q. Now, Mr. Carter, by delivery of that expense bill to the consignee what does that mean on the part of the railroad Co.?

Mr. BIDDISON: To that we object as not proper cross-examination.

COURT: Objection overruled.

Exception.

61 A. I don't know what it would mean according to law.

Q. What does it mean according to the railway company.

Mr. BIDDISON: To that we object——

COURT: Objection overruled.

Exception.

A. When the expense bill is presented to me as ware-house foreman it means delivery of the goods.

Q. Do you keep the ware house open day and night?

A. Not as a rule.

Q. Does the railroad company keep it open day and night?

A. They have no rule about that at all.

Q. When you are hired, to the railroad company, are you supposed to work day and night?

Mr. BIDDISON: To that we object as immaterial.

COURT: Objection overruled.

Exception.

A. My regular hours are from 6.45 in the morning until 10 o'clock at night and as much after as will take to get the work done.

Q. On this night you had gone to bed?

A. Yes sir.

Q. What does that mean, Mr. Carter? (indicating initials on Expense Bill.)

A. It is an abbreviation of some transfer Company. That's about

all you generally find on the regular way-bill; they just abbreviate them.

Q. What does that stand for, do you think? Do you know that hand writing?

A. I think I do.

Q. What are those initials on there?

A. I couldn't say whether it was F. J. or F. I.

Defendant Rests and this is all the evidence introduced on the trial.

62 Thereupon the Court instructs the jury as follows:

"In the County Court of Tulsa County, State of Oklahoma.

Criminal Case, No. 342.

STATE OF OKLAHOMA, Plaintiff.

vs.

CHARLES OVERTON et al., Defendants.

Given at Request of Defendant.

I.

The Court instructs the Jury that this is a prosecution by the State of Oklahoma against the defendants, Charles Overton and one Mitchell, in which the defendants are charged with carrying or transporting intoxicating liquors from one place within the State of Oklahoma to another place therein, contrary to the law of Oklahoma knowes as the Billups Bill, the same not being a lawful purchase, on the 1st day of July, 1908, and the jury is instructed that it devolves upon the State to establish beyond a reasonable doubt each and every material allegation of said charge. Before you are justified in finding a verdict of guilty against the defendants you must find from the evidence beyond a reasonable doubt that they did carry intoxicating liquors from one place within the State to another place therein, and that the same was not a lawful purchase.

N. J. GUBSER,
County Judge.

(II.)

The Court further instructs the Jury that if they find from the evidence that the defendants did carry intoxicating liquors from one place within the State of Oklahoma to another place within the State but find that said intoxicating liquors had been shipped from a point within the state of Missouri consigned to the defendants or either of them at the City of Tulsa, Tulsa County, Oklahoma,

63 and that the defendant consigned was carrying said intoxicating liquors from where he had received them from the common carrier which has brought them into the State of Oklahoma, to his home, then you shall find the defendants not guilty.

N. J. GUBSER,
County Judge.

III.

The Court instructs the Jury that before you can find the defendant Mitchell guilty you must find that said defendant Mitchell knew the contents of the package containing the intoxicating liquors, and must find that said intoxicating liquors were not a lawful purchase made by defendant Overton, and must find that said intoxicating liquors were not an interstate shipments made from a point in the State of Missouri to Tulsa, Oklahoma, consigned to said Overton and being carried by said Overton from the point where was *was* delivered to him by the common carrie*d* to his home.

N. J. GUBSER,
County Judge.

BIDDISON, CAMPBELL & EAGLETON.

(Endorsed:) Criminal Case No. 342. Instructions given. County Court Tulsa Co. Okla. Filed Aug. 29, 1908. G. W. Davis, Clerk.

In the County Court of Tulsa County & State of Oklahoma.

Criminal Case, No. 342.

STATE OF OKLAHOMA
vs.
CHARLIE OVERTON and CLYDE MITCHELL.

Instructions Given to Jury by Court.

(1.)

Gentlemen of the jury you are instructed that before you
64 find the defendants guilty you must find from the evidence beyond a reasonable doubt that the defendants committed the offence charged in the complaint and information.

N. J. GUBSER,
County Judge.

II.

You are further instructed that a reasonable doubt is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge; that is, to a certainty that convinces and directs the understanding and satisfied the reason and judgment of those who are bound to act conscientiously upon it.

N. J. GUBSER,
County Judge.

III.

You are further instructed that five of you concurring have power to render a verdict; in which event the verdict shall be in writing and signed by each juror concurring therein.

N. J. GUBSER,
County Judge.

IV.

Gentlemen of the jury you are further instructed that you are the sole judges as to the credibility of the witnesses: it is for you to say what weight should be given to their testimony; and in determining credibility, you are at liberty to consider the interest of the witness in the case, his bearing and demeanor while on the witness stand, and his willingness or unwillingness to respond to questions.

N. J. GUBSER,
County Judge.

V.

You are further instructed that the defendants are presumed to be innocent until proven guilty, and the burden of proof is upon
65 the State to prove beyond a reasonable doubt by the evidence in the case that the defendants are guilty before you can find them guilty of the offence with which they are charged in the information.

N. J. GUBSER,
County Judge.

VI.

You are further instructed that whiskey is an intoxicating liquor, within the meaning of the prohibition of the State Constitution and laws of the State prohibiting the shipping or conveying of intoxicating liquor from one place within the State to another place therein.

N. J. GUBSER,
County Judge.

VII.

You are instructed that actual constructive possession of intoxicating liquor is not as a matter of law prima-facie evidence of conveying, but it is a circumstance which the jury must take into consideration, together with the other facts of the case. Prima-facie evidence is such evidence which if standing alone would put the opposite party on his defence to explain it away.

N. J. GUBSER,
County Judge.

VIII.

You are further instructed that carrying or transporting intoxicating liquor on or along the streets or alleys, or across or on lots or elsewhere is prima facie evidence of conveying intoxicating liquors, and is such evidence as will put the defendant on his defense, and he must show by a rational explanation that he was not violating the law. Conveying liquor bought from the local dispensary is not an offense under the law.

N. J. GUBSER,
County Judge.

66

IX.

You are further instructed that if the proof and evidence show beyond a reasonable doubt that the defendants carried or transported intoxicating liquor along or on the streets or alleys or lots intervening between the points named in the complaint and information, or any portion of said distance, and that such carrying did not come within the exceptions enumberated in these instructions, then you must find the defendants guilty.

N. J. GUBSER,
County Judge.

X.

The Court further instruct*ion* you that a lawful purchase contemplated by the prohibition laws of this State is a purchase from the State or local dispensary agency.

N. J. GUBSER,
County Judge.

(Endorsed:) Criminal No. 342. Instructions Given. County Court Tulsa Co. Okla. Filed Aug. 29, 1908. G. W. Davis, Clerk."

And thereupon said cause was argued to the said jury by counsel for plaintiff and for the defendant, and thereafter and on the 29th day of August, 1908, the said jury retired to consider their verdict, and thereafter and on said day the said jury returned into court *there* verdict in words and figures as follows, to-wit:

"In the County Court of Tulsa County and State of Oklahoma.

Criminal Case, No. 342.

STATE OF OKLAHOMA
vs.
CHARLIE OVERTON and CLYDE MITCHELL.

Verdict.

67 We the jury duly empaneled and sworn do find the defendant Charlie Overton guilty as charged in the complaint and information and assess his penalty at a fine of $100.00 and by imprisonment in the County jail for a period of sixty days.

We the jury duly empaneled and sworn do find the defendant Clyde Mitchell not guilty as charged in the complaint and information and assess his penalty at a fine of $No and by imprisonment in the county jail for a period of no days.

RALSA F. MORLEY, *Foreman.*

(Endorsed:) Criminal 342. Verdict. County Court Tulsa Co. Okla. Filed Aug. 29 1908. G. W. Davis, Clerk."

Which verdict was by the Court read, filed and recorded in the presence of the jury. And thereupon the Court entered judgment that the defendant Clyde Mitchell was not guilty and that he be discharged, and his bondsmen ex*hobo*rated, and the Court then and there set the 16th day of September, 1908, for entering judgment in said cause by order duly entered. Thereafter, and on said 16th day of September, 1908, the defendant Charlie Overton filed in Court and before judgment in said cause his motion for a new trial, which is in words and figures as follows, to-wit:

"In the County Court of Tulsa County, Oklahoma.

STATE OF OKLAHOMA, Plaintiff,
vs.
CHARLES OVERTON, Defendant.

Motion for New Trial.

Comes now the defendant, Charles Overton, and moves the Court to quash, vacate and set aside the verdict of the jury in this cause and grant defendant a new trial therein for the following reasons, which affect the substantial rights of this defendant whereby
68 he has been prejudiced:

First. The jury received evidence our of Court other than that received from a view of the premises.

Second. The jury was guilty of misconduct by which a fair and due consideration of the case has been prevented.

Third. The jury took to their jury room and there read in evidence and discussed and considered and argued a certain newspaper article printed in the Tulsa Daily World, dated Saturday, August 29th, and a copy of which is attached to the affidavit of C. C. Berry filed herewith, and in which said article the following appears:

"Overton was until recently a partner of Tom Taylor, and together they have shipped vast quantities of booze into Tulsa. No one who has his eyes open to conditions as they exist in Tulsa but what knows that Overton is guilty of the grossest violations of the prohibitory law."

and some of the jurors in said jury room stated to the other jurors that the said Overton was a boot-legger and engaged in the business of violating the prohibitory liquor law of this state.

Fourth. The jurors inquired of the bailiff for what length of time they would be kept to agree upon a verdict, and were by the bailiff in charge of said jury advised that they would be required to agree on a verdict and might be kept all night, and would be kept until late, and this while said jurors were in the consideration of the case in their jury room.

Fifth. Divers of the jurors, to-wit; the juror Watts and the juror Green, stated in the jury room that "they would not be governed by and would not consider as the law of the case the instructions of

the Court with reference to the right of the defendant to carry an interstate shipment of liquor to his home.

69 Sixth. The verdict was decided by means other than a fair consideration of opinion on the part of the jury in that certain jurors concurred in the verdict because they believed they would be detained until they did so agree and the necessity of their business required their presence elsewhere, and the jurors Watts and Green stated that they did not have anything to do and would remain indefinitely and never would concur in a verdict of not guilty.

Seventh. The Court misdirected the jury in matter of law, and in the decision of questions of law arising during the course of the trial.

Eighth. The verdict is contrary to law and evidence.

Nineth. Misconduct of the County Attorney prosecuting said cause in asking questions prejudicial to the defendant as to what the defendant had done with certain whiskey.

BIDDISON, CAMPBELL & EAGLETON,
Attorneys for Defendant.

(Endorsement:) No. 342. State of Oklahoma, Plaintiff vs. Charles Overton, Defendant. Motion for New Trial. County Court Tulsa Co. Okla. Filed Sept. 16 1908. Geo. W. Davis, Clerk. Biddison, Campbell & Eagleton, Att'ys for Defendant."

and in support of said motion filed the affidavit of C. C. Berry, which is in words and figures as follows, to-wit:

"In the County Court of Tulsa County, Oklahoma.

STATE OF OKLAHOMA, Plaintiff,
vs.
CHARLES OVERTON, Defendant.

Affidavit.

C. C. Berry, of lawful age, being duly sworn, on his oath, says: That he was one of the jurors in the County Court of Tulsa

70 County, in the trial of the above entitled cause, and sat as a juror in said cause; that he resides at Beulah, Oklahoma. That during the consideration of said cause by the jury some of the jurors stated while the jury was considering of their verdict that -he defendant Charles Overton was a boot-legger and engaged in the business of selling intoxicating liquors in violation of law, and had been for years so engaged, and had shipped large quantities of liquor into Tulsa for illicit sale, and argued that the said defendant for that reason *a*ught not to be acquitted in said cause, and argued that the in*in*structions of the court with reference to the interstate shipments of liquor were not the law, and in support of their statements as to the character of he said Overton they produced a copy of the newspaper called the Tulsa Daily World, dated Saturday, August 29th, from which they read in the jury room the article

printed in said paper, and which is hereto attached, marked "Exhibit A" and made a part of this affidavit.

That during their said deliberations and after the jury had been brought into Court and had reported that they were unable to agree upon a verdict and had been returned to their jury room for further consideration of the cause one of the jurors opened the door of the jury room and inquired of the baliff how long they would be required to remain as jurors to agree upon a verdict, and the bailiff in charge of said jury stated in substance that they would be required to agree, and would be kept until night or probably all night. That the business affairs of the affiant were in such condition that it required him to be released before night of said Saturday.

Affiant believed the statements of the said bailiff and believed that unless he concurred in a verdict the jury would not be dis-
71 charged in time for him to reach his business that required his attention of the said day.

During the greater part of the time the vote of the jury was four for acquit-al and two for conviction, and said two jurors voting for conviction stated that they had nothing to do and would remain there indefinitely before they would agree to a verdict of acquit-al, and they refused to be bound by or recognize as the law of the case the instruction of the court with reference to the right to make interstate shipments of liquor.

C. C. BERRY.

Subscribed and sworn to before me this 14th day of September, 1908.

[SEAL.] ROBERT E. LYNCH,
Notary Public.

My commission expires July 2", 1910.

"A."

Sprung a Surprise.

Overton Falls Back on the Interstate Commerce Defense.

When Charles Overton was put on trial in county court yesterday on a charge of conveying liquor, he had a card up his sleeve which will probably be the means of gaining his acquittal. His own testimony backed by documentary evidence, and the word of a former railway employé, showed that the transaction for which he was put under arrest was of a nature to come within the meaning of an interstate shipment as ruled upon several time- by Judge Gubser and held to be correct by the state attorney general. It is believed by many familiar with the case that he cannot be convicted on the charge if the precedent heretofore established is followed.

Overton was caught by Deputy Sheriff Moran early in the morning of July 1, between midnight and three o'clock, while driving in a hack with two sacks of bottled whiskey. The arrest took place near the Frisco right of way on Elgin Avenue. The evidence ap-

peared to be pretty plain against Overton, as there seemed to be little *change* to claim *than* an interstate transfer of goods was taking place, for the reason that it was not customary to ship booze in sacks, as every one knows. A count of the bottles when turned over to the sheriff's office showed that the sack contained ninety-four half pint bottles in addition to two broken, making a total of ninety-six.

When the trial began Attorney Biddison for the defense waived proof of the ownership and capture of the liquor, admitting that the whiskey was Overton's and that it had been taken under the
72 circumstances related. Then Overton was put on the stand to show how he came to have it in his possession. He said that he had shipped the stuff in for his personal use, that he had just a few minutes before had it delivered to him at the Katy station by a freight clerk and that he was on his way directly home at the time of his capture. He told how he ordered a cab soon after midnight, had driven to a restaurant near the Katy station, where Frank Carter, at that time warehouseman for the railway had been aroused and requested that he let him have two cases of whiskey which had been waiting his call. Carter complied, but the boxes were found to be damaged to an extent that Overton hesitated to carry them. He therefore procured from the hackman a couple of gunny sacks and transferred the bottles from the cases. Overton produced the expense bill that he said he had paid the day before taking the goods. The bill showed the shipment to have left Kansas City on June 25, arriving in Tulsa two days later. On the bill is noted the fact that the shipment came in bad order. On being put on the stand, Carter corroborated all of the important details of Overton's story.

Overton was until recently a partner of Tom Taylor and together they have shipped vast quantities of booze into Tulsa. No one who has his eyes open to conditions as they exist in Tulsa but what knows that Overton is guilty of the grossest violations of the prohibitory law. Yet in the case now in court, it unquestionable appears that he has no chance of being convicted for the reason that it has been held time and again that it is no offense to ship in liquor for personal use and to arrest a man in the act of transferring it from the station to his home is interfering with interstate commerce. It is probably that the case will be put into the hands of the jury this morning.

(Endorsed:) No. 342. State of Oklahoma vs. Charles Overton. Affidavit. County Court Tulsa Co. Okla. Filed Sept. 16, 1908. G. W. Davis, Clerk."

And thereupon the defendant introduces evidence in further support of said motion, the same being then and there duly called for hearing, which evidence is in words and figures as follows, to-wit:

73 *Testimony Taken Sept. 16th.*

My name is A. J. Biddison, I reside at Tulsa, Oklahoma, and I am a practicing attorney admitted to practice in the Courts of this State; and have had sole charge of the defense of the Case No. 342, State of Oklahoma vs. Charles Overton, the case in which this motion for a new trial is filed.

I had no knowledge at any time during the course of the trial nor until after the trial was completed and the verdict of the jury received and entered that any grounds for a new trial stated in the motion for a new trial, so far as the same are effected by a misconduct of the jury.

I did not know that the jury had no information that would lead me to suspect or believe that the jury had the newspaper in the jury room of which complaint is made and I did not know that they had the same until long after the verdict was received. And in fact not until the day prior to the making of the affidavit of that fact by the juror, C. C. Berry.

Mr. OVERTON was called to the witness stand and after first being duly sworn testified as follows:

Mr. BIDDISON:

Q. You are the defendant in the case on trial?

A. Yes sir.

Q. I will ask you if you had any notice or knowledge of any misconduct of the jury as charged in its motion for a new trial, until after the verdict was received and entered?

74 A. No sir.

Q. When did you first learn of the use or presence of the newspaper in the jury room?

A. I think you told me the day before I got my affidavit.

SEPTEMBER 18, 1908.

Be it remembered that on this 17th day of September, 1908, the same being a regular day of the July 1908 term of Court the above entitled case coming on for hearing the following proceedings were had: The defendant filed his præcipe for a subpœna for jurors Williamson and Morley. Subpœna was issued returnable at 9 o'clock a. m. Sept. 18, 1908.

Be It Remembered, that on this 18th day of September, 1908, the same being a regular day of the July 1908 term of Court the above entitled case coming on for hearing the following proceedings were had:

GEORGE T. WILLIAMSON, being first duly sworn on his oath testified as follows:

Direct examination—Mr. BIDDISON:

Q. State your name.
A. George——

Mr. BRECKENRIDGE: The state objects to the introduction of this evidence from one of the jurors for the reason that it is incompetent and tending to impeach the verdict of the jury; and further as it is admissable. I don't make the objection on the question of the mode of examining the witness whether by affidavit or orally but my objection goes to the admissability of any juror to impeach his verdict; or to the admissability of the evidence of any juror upon the verdict rendered.

75 COURT: Objection heard overruled.

A. George T. Williamson.
Q. You reside in the City of Tulsa?
A. Yes sir.
Q. And were one of the jurors in the case of the State of Oklahoma against Charles Overton, No. 342 in this Court?
A. Yes sir.

It is considered that the County Attorney objects to each question with the same ruling by the Court.

Q. You were present in the Jury room during the consideration of this case by the jury?
A. Yes sir.
Q. I will ask you to examine this "Exhibit "A", the newspaper clipping attached to the affidavit of C. C. Berry; who was a juror in that case; I will ask you to state now Mr. Williamson if that newspaper containing that article was in the jury room during your deliberations?
A. Yes; it was. I am quite sure.
Q. I will ask you if it was there read and commented on and discussed and considered by the jury or members thereof while you were deliberating on the verdict in this case?
A. I don't think it was read in the jury room. It was possibly mentioned but I don't think it was read.
Q. Was no parts of it read there to the jury?
A. I don't know whether it was read or just discussed by parties that had read it during the morning.
Q. But it was discussed?
A. It was mentioned.
Q. And the paper with the article in was there in the jury room?
A. I am quite sure it was.

76 Q. A reference was made to the article and to its statements in the discussion?
A. There was but very little said about it. I don't think it was discussed at length.
Q. To refresh your memory, did you hear the discussion between

Juror Morley and Juror Watts with reference to the statements of law contained in that article as to whether it supported the instructions of the Court or was contrary thereto with a criticism thereof?

Mr. BRECKENRIDGE: I don't see, if the Court please, in what light that would be admissable in this case.

Mr. BIDDISON: That is simply to refresh the memory of the witness.

The COURT: In view of the fact that the jurors in this case came into the Court room in the presence of the defendant and the attorneys for both sides and asked the Court if they should be guided by the instructions the Court considers the question indeffinite as to time, whether the conversation from the court.

The COURT: Let the witness answer.

Q. You remember the discussion in the jury room particularly between the juror Morley and the Juror Watts with reference to the bearing of this article upon the instructions or law of interstate shipments as given by the court, and with reference to the argument that this article showed or did not show that the Attorney General agreed with the Court as to what the Law of Interstate Shipments were.

A. There was some argument on that question; whether it was between Morley and Watts or the other party I wouldn't say positive.

77 Q. Did that occur, as you recollect it, before or after the jury came in here?

A. I don't know; I am inclined to think it was before they left here. I wouldn't swear which it was.

Q. They did come into the Court room and ask about it?

A. Yes sir we did; but I wouldn't say whether it was before or after.

Cross-examination — Mr. BRECKENRIDGE:

Q. Mr. Williamson, was anything said in that jury room whether or not the jury believed or disbelieved the testimony of Overton?

Mr. BIDDISON: On that proposition you get squarely on the line of these questions. The defendant objects to this for the reason that the offense sought is one going to the grounds and basis of the decision and verdict and not as to specific facts that may have influenced their verdict and is calling for testimony within the individual consciousness of the jurors.

COURT: Objection heard, sustained.

Exception.

Q. Mr. Williamson, did you hear the reading of that paper?

A. As I stated before I don't think the article was read in full.

Q. Did you pay any attention?

A. No sir; I paid no attention to it with the exception I noticed the heading of the article in the morning paper and possibly read a few lines; and never finished the article. The article was mentioned in the jury room but was not read at length as I remember.

78 Q. Do you know how it got there?

A. No; I don't.

Q. Don't you know who had it?
A. I don't know who brought it in there.
Q. It was passed around among the jurors; among some of them at least?
A. Possibly so. I think it was now, to one or two. Someone spoke of reading the article. And they was saying that it wasn't necessary.

Defendant rests and the foregoing is all the evidence introduced upon the said motion.

(Endorsed:) County Court Tulsa Co. Okla. Filed Sept. 21, 1908. G. W. Davis.

79 And thereupon said motion was argued to the Court, and after hearing said argument and being fully advised in the premises the court doth overrule said motion, to which the defendant Overton excepts, and thereupon such further proceedings were had in said cause as appears from the journal entry thereof, which journal entry is in words and figures as follows, to-wit:

80 In the County Court of Tulsa County, Oklahoma.

No. 342.

STATE OF OKLAHOMA, Plaintiff,
vs.
CHARLIE OVERTON and One MITCHELL, Whose First Name is Unknown, Defendants.

Journal Entry.

Now, to-wit: On this 28th day of August, 1908, this cause comes on for trial and the defendant appears in person and by his attorneys, Biddison, Campbell & Eagleton, and the plaintiff appears by M. A. Breckenridge, County Attorney of Tulsa County, Oklahoma, and there is called a jury of good and lawful men, as follows, to-wit: R. F. Morley, C. C. Berry, C. R. Aubrey, H. C. Green, Geo. Williamson, and W. A. Watts, who are duly empanneled and sworn to try the issues in this cause, and thereupon the counsel for plaintiff states his case to the jury, introduces his evidence in support thereof and rests his cause, and the defendant introduces his evidence and rests his cause, and thereupon the court instructs the jury in writing, and the cause is argued by counsel for plaintiff and defendant, and the jury retired to consider their verdict in charge of a sworn bailiff, and thereafter and upon the same day returned into court with their verdict, which is in words and figures as follows, to-wit:

"In the County Court of Tulsa County and State of Oklahoma.

Criminal Case, No. 342.

STATE OF OKLAHOMA
vs.
CHARLIE OVERTON and CLYDE MITCHELL.

Verdict.

81 We the jury duly empaneled and sworn do find the defendant Charlie Overton guilty as charged in the complaint and information and assess his penalty at a fine of $100.00 and by imprisonment in the County jail for a period of sixty days.

We the jury duly empaneled and sworn do find the defendant Clyde Mitchell not guilty as charged in the complaint and information and assess his penalty at a fine of $No. and by imprisonment in the county jail for a period of no days.

RALSA F. MORLEY, *Foreman.*

Which verdict is by the Court received, read and filed and recorded in the presence of the Jury and of the defendant, and thereupon the Court orders that this cause stand for judgment upon the 16th day of September, 1908, and thereafter, to-wit: upon the 16th day of September, 1908, the plaintiff appearing by M. A. Breckinridge, County Attorney of the said Tulsa County, and the defendant appearing in person and by his attorneys, Biddison, Campbell & Eagleton, the cause comes on for judgment, and the defendant Charlie Overton files his motion for a new trial, which is argued to the Court and the Court overrules said motion, to which ruling of the Court the defendant Charlie Overton excepts, and thereupon the Court adjudges the defendant guilty as charged in the information.

And it is thereupon by the Court considered, ordered and adjudged that the defendant be fined and that he pay a fine of One Hundred Dollars and be imprisoned in the Court jail for a period of sixty days, to which order and judgment the defendant excepts, and thereupon the defendant prays an appeal to the Supreme Court, which appeal is allowed, and the bond upon ap-

82 peal fixed at the sum of One Thousand Dollars, to be given in ten days from this date, and the defendant is given forty-five days in which to make and serve a casemade for the Supreme Court, and plaintiff is given ten days thereafter in which to suggest amendments thereto, the case made to be settled upon five days' notice, by either party, and the appeal to be filed in the Supreme Court within four months from this date.

____ ____,
County Judge.

O. K.

____ ____,
County Attorney.

O. K.

____ ____,
Attorneys for Defendant.

Filed Sep. 16, 1909.

83 We hereby submit the foregoing as a true and correct case made in the above entitled cause.

(Signed) BIDDISON, CAMPBELL & EAGLETON,
Attorneys for Defendant.

Now, on this 16th day of October, 1908, I hereby acknowledge service of the foregoing case made to have been made on me at this time.

(Signed) M. A. BRECKENRIDGE,
County Attorney of Tulsa County, Oklahoma.

84 In the County Court of Tulsa County, Oklahoma.

STATE OF OKLAHOMA, Plaintiff,
vs.
CHARLIE OVERTON and One MITCHELL, Whose First Name is Unknown, Defendants.

Notice of Appeal.

To M. A. Breckenridge, County Attorney of Tulsa County, Oklahoma, and to the Clerk of the County Court of said County:

You are hereby notified and will take notice that the defendant, Charlie Overton appeals from the judgment in the above entitled cause rendered against the *the* said defendant, Charley Overton, on the 16th day of September, 1908.

(Signed) BIDDISON & CAMPBELL,
Attorneys for Defendant, Charley Overton.

Filed Sept. 16, 1909. W. H. L. Campbell, Clerk.

We hereby acknowledge service of the foregoing notice to have been made on us this 10th day of Sept. 1909.

(Signed) M. A. BRECKINRIDGE,
County Attorney.

(Signed) G. W. DAVIS,
Clerk of the County Court of Tulsa County, Oklahoma.

85 I, the undersigned Judge of the County Court of Tulsa County, State of Oklahoma, hereby certify that the foregoing was presented to me as a case made in the above entitled action, the same having been served in due time, and the plaintiff and defendant appearing by their respective counsel, and the plaintiff waiving any suggestion of amendment, I now settle and sign the same as a true and correct case made and direct that it be attested and filed by the Clerk of the County Court of Tulsa County, Oklahoma.

Witness my hand at Tulsa, Tulsa County, State of Oklahoma, this 14 day of September, 1909.

(Signed) N. J. GUBSER, *Judge.*

Attest:
[SEAL.] G. W. DAVIS,
Clerk County Court.

(Endorsed:) County Court State of Oklahoma, County of Tulsa. Filed Sep. 14, 1909. N. J. Gubser, Judge. Filed Sep. 16, 1909. W. H. L. Campbell, Clerk.

86 In the Criminal Court of Appeals of the State of Oklahoma.

CHARLES OVERTON, Plaintiff in Error,
vs.
THE STATE OF OKLAHOMA, Defendant in Error.

Stipulation for Extension of Time in Which to File Brief.

It is hereby agreed and stipulated by and between the above named Plaintiff in Error and the above named Defendant in Error, by the Attorney General of the State of Oklahoma, that the time in which the Plaintiff in Error has to file his brief in this case be extended sixty days.

(Signed) BIDDISON & CAMPBELL,
Attorneys for Plaintiff in Error.
CHAS. L. MOORE,
Ass't Attorney General,
Attorney for Defendant in Error.

Nov. 29 time extended as per stipulation.

(Signed) DOYLE, *J.*

(Endorsed:) Number A-307. Charles Overton, Plaintiff in error, vs. State of Oklahoma, Defendant in Error. Stipulation for extension of time in which to file brief. Filed Nov. 24, 1909. W. H. L. Campbell, Clerk. Biddison and Campbell, for Plaintiff in Error.

87 And thereafter, to-wit, on the 29th day of November, 1909, in the Criminal Court of Appeals of Oklahoma, the following proceedings were had in said cause:

CRIMINAL COURT OF APPEALS PROCEEDINGS.

No. A-307.

CHARLES OVERTON, Plaintiff in Error,
vs.
STATE OF OKLAHOMA, Defendant in Error.

Now on this 29th day of November, 1909, it is ordered by Doyle, J., that time to file briefs in above cause be extended as per stipulation on file.

88 In the Criminal Court of Appeals of the State of Oklahoma.

No. A–307.

CHARLES OVERTON, Plaintiff in Error,
vs.
STATE OF OKLAHOMA, Defendant in Error.

Motion to Dismiss for Want of Prosecution.

Comes now the State of Oklahoma by its attorney, Fred S. Caldwell, as Counsel to the Governor, and represents to this Honorable Court as follows:

The judgment from which this appeal is undertaken to be prosecuted was rendered in the trial court on the 28th day of August, 1908, and the petition in error was filed in this Court on the 16th day of September, 1909, and plaintiff in error has failed and neglected to prosecute said appeal in that no briefs have been filed in said cause, by plaintiff in error.

Wherefore, the premises aforesaid duly considered, the State of Oklahoma, upon the authority of Elrick v. State 103 Pac. 1038 and Belt v. State, 103 Pac. 1069, prays the dismissal of said appeal for want of prosecution, or the affirmance of the judgment appealed from, at plaintiff in error's cost.

(Signed) FRED S. CALDWELL,
Counsel to the Governor and
Attorneys for the State of Oklahoma.

Certificate of Service of Motion.

Fred S. Caldwell, attorney of record for the State of Oklahoma in the foregoing action, hereby certifies that he served the above and foregoing motion upon Messrs. Beddison & Campbell, attorneys at law, of Tulsa, Oklahoma, and attorneys of record for plaintiff in error, by enclosing a copy thereof in an envelop-, duly stamped and addressed to the said Beddison & Campbell, and depositing the same in the United States Mail at Guthrie, Oklahoma, on the 26th day of March, 1910.

(Signed) FRED S. CALDWELL.

(Endorsed:) No. A-307. Criminal Court of Appeals. Charles Overton vs. State of Oklahoma. Motion to dismiss for want of prosecution. Filed Mar. 26, 1910. W. H. L. Campbell, Clerk.

89 And thereafter, to-wit, on the 28th day of March, 1910, in the Criminal Court of Appeals of Oklahoma, the following proceedings were had in said cause:

Criminal Court of Appeals, March Term, 1910, March 28th, 1910, Sixth Judicial Day.

No. A–307.

CHARLIE OVERTON, Plaintiff in Error,
vs.
STATE OF OKLAHOMA, Defendant in Error.

And now on this day it is ordered by the Court that the plaintiff in error herein be allowed 20 days to file brief, and defendant in error 15 days to file brief, and the above cause is this day argued orally and the cause submitted on the record, briefs, and oral argument.

90 And thereafter, to-wit, on the 28th day of March, 1910, in the Criminal Court of Appeals of Oklahoma, the following proceedings were had in said cause:

Criminal Court of Appeals, March Term, 1910, March 28th, 1910, Sixth Judicial Day.

No. A–307.

CHARLIE OVERTON, Plaintiff in Error,
vs.
STATE OF OKLAHOMA, Defendant in Error.

And now on this day it is ordered by the court that plaintiff in error herein be allowed to withdraw record for purpose of briefing.

91 And thereafter, to-wit, on the 3rd day of May, 1910, in the Criminal Court of Appeals of Oklahoma, the following proceedings were had in said cause:

Criminal Court of Appeals, May Term, 1910, May 3rd, 1910, First Judicial Day.

No. A–307.

CHARLIE OVERTON, Plaintiff in Error,
vs.
STATE OF OKLAHOMA, Defendant in Error.

And now on this day upon application of defendant in error the motion to dismiss filed herein is withdrawn and the cause submitted.

92 And thereafter, to-wit, on the 18th day of April, 1911, in the Criminal Court of Appeals of Oklahoma, the following proceedings were had in said cause:

Criminal Court of Appeals, March Term, 1911, April 18th, 1911, Fourth Judicial Day.

No. A–307.

CHARLEY OVERTON, Plaintiff in Error,
vs.
STATE OF OKLAHOMA, Defendant in Error

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed, and the cause remanded.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby affirmed, and the cause remanded with directions to proceed with the execution of its judgment. Opinion per curiam.

93 And thereafter, to-wit, on the 27th day of April, 1911 in the Criminal Court of Appeals of Oklahoma, the following proceedings were had in said cause:

Criminal Court of Appeals Proceedings.

No. A–307.

CHARLIE OVERTON, Plaintiff in Error,
vs.
STATE OF OKLAHOMA, Defendant in Error.

And now on this 27th day of April 1911 it is ordered that the mandate of the court in the above cause be, and the same is hereby stayed, and the opinion heretofore filed in the above cause is hereby withdrawn.

94 And thereafter, to-wit, on the 2nd day of May, 1911, in the Criminal Court of Appeals of Oklahoma, the following proceedings were had in said cause:

Criminal Court of Appeals, May Term, 1911, May 2nd, 1911, First Judicial Day.

No. A-307.

CHARLEY OVERTON, Plaintiff in Error,
vs.
STATE OF OKLAHOMA, Defendant in Error.

And now on this day the opinion of the court heretofore filed in the above cause, is refiled, and the mandate is ordered to issue.

95 And thereafter, to-wit, on the 3rd day of May, 1911, in the Criminal Court of Appeals of Oklahoma, the following proceedings were had in said cause:

Criminal Court of Appeals Proceedings.

No. A-307.

CHAS. OVERTON, Plaintiff in Error,
vs.
STATE OF OKLAHOMA, Defendant in Error.

And now on this May 3 1911 it is o-dered by the court that plaintiff in error herein be allowed 15 days within which to file petition for rehearing, and the mandate of this court is hereby stayed until **further order.**

96 Filed May 18, 1911. W. H. L. Campbell, Clerk.

In the Criminal Court of Appeals of the State of Oklahoma.

A-307.

CHARLES OVERTON, Appellant,
vs.
THE STATE OF OKLAHOMA, Appellee.

Petition for Rehearing.

Biddison & Campbell, Davidson & Williams, Attorneys for Appellant.

97 In the Criminal Court of Appeals of the State of Oklahoma.

A-307.

CHARLES OVERTON, Appellant,
vs.
THE STATE OF OKLAHOMA, Appellee.

Petition for Rehearing.

The appellant Charles Overton respectfully petitions the Court for a rehearing of this case because the "per curiam" opinion of the Court overlooks questions decisive of the case and duly submitted by counsel, and is in conflict with the Statutes and Constitution of the State of Oklahoma, the Constitution of the United States, and controlling decisions of this Court and the Supreme Court of the United States.

In its opinion affirming this case, the Court says that all questions raised by counsel for appellant have been previously decided by this

Court adversely to our contention. It is true some of these questions have been decided adversely to us since this case was briefed, but by no means all of them.

98 The constitutionality of the Statute under which appellant is charged was raised by counsel, presented in their brief and elaborated on oral argument of the case. If this Court has passed upon the constitutionality of the conveying clause of the Billup's Bill, except by assuming its validity in cases where the question was not raised or presented in brief or argument, it has escaped our attention and we are not aware of any such decision by this Court. The validity of the statute under which appellant is charged is squarely presented in this case.

One ground of appellant's motion for a new trial was that the verdict of the jury is contrary to the law and the evidence. The appellant excepted to the overruling of his motion for a new trial by the court, and assigned this action of the court as error in his petition in error in this Court. There is no question as to what are the facts in this case. The evidence is uncontroverted and undisputed, and this Court has time and time again held that such a state of facts as is shown by the record in this case is not a violation of the conveying clause of the liquor law. It so held in the case of High et al. v. State, 101 Pac. 115; also in the case McCord v. State, 101 Pac. 280; also in the case of Hudson v. State, 101 Pac. 275. The Supreme Court of Oklahoma has so held in the case of Schwedes v. State, 99 Pac. 804. The Supreme Court of the United States has so held in numerous cases, among which are Scott v. Donald, 165 U. S. 58; 41 L. Ed. 632; Vance v. W. A. Vandercoook Co., 170 U. S. 439; 42 L. Ed. 1100; Heymand v. Southern R. Co., 203 U. S. 270, 51 L. Ed. 178; Adams Express Co. v. Kentucky, 206 U. S. 129, 51 L. Ed.

987. Not only has this question not been passed on adversely by this Court to our contention, but this Court has sustained our

99 contention in several cases, following these decisions of the Supreme Court of the United States.

Another ground of appellant's motion for a new trial is misconduct of the jury and bailiff. This error is squarely presented to the Court, and we fail to see how it can be said that it has been previously passed upon by the Court adversely to our contention. We know of no decision of this Court based upon facts like or even similar to the facts relied upon in this case as misconduct of the jury and bailiff.

While it is true that no demurrer was filed to the information and no exceptions saved to the instructions of the Court, the validity of the statute, the sufficiency of the evidence to sustain the verdict under the law and the misconduct of the jury and the bailiff are properly and squarely presented to the Court, and we earnestly insist that the Court should consider them. We will discuss them in their order.

I.

Conveying Clause Unconstitutional.

The conveying clause of Sec. 4180 of Snyder's Compiled Laws of Oklahoma is unconsistitutional because it discriminates against

liquors purchased through an interstate shipment. It is in conflict with the interstate commerce clause of the Constitution of the United States, and is a burden on interstate commerce in intoxicating liquors.

That portion of said section under consideration is as follows:

100 "It shall be unlawful for any person, individual or corporate, * * * to ship or in any way convey such liquor from one place within this state to another place therein, except the conveyance of a lawful purchase as herein authorized; * * *"

The only lawful purchase authorized by the statute is one from the State under the rules and regulations therein provided. The statute provides an elaborate system for the sale of intoxicating liquors by the State through its dispensaries, and prescribes minutely the method by which they are sold. It is therefore unlawful under the terms of the statute to convey from one place within the state to another place ther-in intoxicating liquors except those lawfully purchased from the state. If, however, intoxicating liquors are lawfully purchased from the state, the purchaser may convey his purchase wherever he pleases and whenever he pleases without infringing this provision of the statute. He may transport it as often as he wishes without regard to the intent or purpose for which it is to be used. The intent or purpose for which the conveyance is made is not an ingredient of this offense, nor is the intent any defense to a prosecution under this clause of the statute. The bare naked fact of conveying liquor not purchased from the state as prescribed in the statute is made a crime without reference to the purpose of the purchase or the purpose, time or place of the transportation.

We call the Court's attention to the difference between the "conveying" clause and the "possession" clause of the statute. In the latter intention to dispose of the liquor in violation of the law is an ingredient of the offense, and a conviction can be had whether the liquor was purchased lawfully from the state or otherwise. So a lawful intent is a defense to a prosecution under the "possession" clause of the statute. But as the intent is immaterial to

101 the offense charged in the information in this case, a legitimate intent is not a defense and has nothing to do with the guilt or innocence of the appellant, and he can not rely on his intent to carry it to his home or to use the same for medical purposes as an excuse, defense or justification, if the "conveying" clause is valid. The two offenses are separate and distinct, and very different. The possession of liquor for the purpose of violating the law is an offense whether it is purchased from the state or by *means* of an interstate shipment. The conveyance of liquor is an offense only when not lawfully purchased from the state. If the liquor is purchased by means of an interstate shipment it can not be conveyed anywhere within the state after the state law attaches, if the conveying clause is valid. This Court has held in a number of cases that the state law attaches to an interstate shipment of liquor upon its arrival at the home or place of storage of the consignee. Thereafter the liquor becomes contraband and can not be lawfully conveyed anywhere in the state. This is a

clear discrimination against liquor purchased outside the state and brought into the state under the protection of the "interstate commerce" clause of the Constitution of the United States.

The decisions of the Supreme Court of the United States, of the Supreme Court of Oklahoma and of this Court hold that a person has the right to ship intoxicating liquors into the state, and that under the "Wilson Act" they do not become subject to the police power of the state until they reach their destination and are delivered to the consignee. The question we raise here is not when the police power of the state may attach, but can the police power of the state be so used as to discriminate against *tive to permit liquor*
102 *purchased from the state to be intnve* to permit liquor purchased from the state to be indiscriminately transported over the state, while that purchased outside the state is limited to conveyance to the home or place of storage of the consignee?

It must be noted that our statute recognizes intoxicating liquors as articles of lawful consumption and commerce. It does not purport to prohibit the importation, the sale or the use of such liquors. Section 4180 of Snyder's Com. Laws of Oklahoma makes it penal to manufacture, sell barter, give away or otherwise furnish such liquors "except as in this act provided." Under other provisions of the act the use of such liquors are merely limited, and the traffic in them for the uses permitted is turned over to state functionaries to be carried on by them alone. Section 4156 creates a state agency and provides for a superintendent thereof; prescribes his duties and the method of purchasing the liquors to be handled by the agency. Section 4158 prescribes how the liquors handled by the state shall be packed, sealed and handled. Section 4159 fixes the rule by which the selling price shall be determined, and Sections 4160 and 4161 provide for the establishment of local agencies throughout the state and the appointment of local agents to operate them. Section 4162 prescribes how the State Agency shall furnish the local agencies with their supplies of liquor, and Sections 4166 and 4167 provide how the liquor shall be sold.

Whatever may be said of this Act, it is clear that it does not prohibit the sale and use of intoxicating liquors. Such liquors are recognized as commodities which may be bought and sold, and
103 under the authority of the decisions of the Supreme Court of the United States must be deemed to be the subject of foreign and interstate commerce.

Scott v. Donald, 165 U. S. 58; 41 L. Ed. 632.

Gulf, Colorado & Santa Fe Railway Co. v. State ex rel. (Okla.), 114 Pac. ——.

Vann v. W. A. Vandercook Company, 170 U. S. 438; 42 L. Ed. 1100.

In the case of Scott v. Donald, supra, the Supreme Court of the United States had under consideration the constitutionality of the Dispensary Law of South Carolina. After reviewing the provisions of the law, which were similar to the provisions of our law, the Court says:

"In view of these and similar provisions, it is indisputable that whatever else may be said of this act, it was not intended to prohibit the manufacture, sale and use of intoxicating liquors. On the contrary, liquors and wines are recognized as commodities which may be lawfully made, bought and sold, and must therefore be deemed to be the subject of foreign and interstate commerce."

At another place in the opinion the Court in that case says:

"The evils attending the vice of intemperance in the use of spirituous liquors are so great that a natural reluctance is felt in appearing to interfere, even on constitutional grounds, with any law whose avowed purpose is to restrict or prevent the mischief. So long, however, as state legislation continues to recognize wines, beer and spirituous liquors as articles of lawful consumption and commerce, so long must continue the duty of the Federal Courts to afford to such use and commerce the same measure of protection,
104 under the Constitution and laws of the United States, as is given to other articles."

Speaking of the Wilson Act the Court says in that case:

"Evidently equality and uniformity of treatment under said law was intended. * * * The question whether a given state law is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors and be valid. Or it may provide equal regulations for the inspection and sale of all domestic and imported liquors and be valid. But the state can not, under the Congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful."

At another place in the opinion the following is found:

"It is sufficient for the present cases to hold, as we do, that when a state recognizes the manufacture, sale and use of intoxicating liquors as lawful, it can not discriminate against bringing such articles in, and importing them from other states; that such legislation is void as a hindrance to interstate commerce and an unjust preference of the products of the enacting state against similar products of the other states."

In the case of Walling v. Michigan, 116 U. S. 446, 29 L. Ed. 691, there was before the Supreme Court of the United States the validity of an act of the Legislature of the State of Michigan imposing a specific tax on persons engaged in the business of selling liquors at wholesale, or of soliciting or taking orders for such liquors to be shipped into the state from places out of the state, not
105 having their principal place of business in the state, without imposing a like tax upon persons engaged in the like business in reference to liquors manufactured in the state, and the Court held the act unconstitutional and void because it discriminated unfavorably against the citizens and products of other states, and was therefore a regulation of interstate commerce repugnant to the Constitution of the United States."

In the course of its opinion in this case the Court says:

"A discriminating tax imposed by a state operating to the dis-

advantage of the products of other states when introduced into the first mentioned state is, in effect, a regulation in restraint of commerce among the states, and as such is a usurpation of the power conferred by the constitution upon the congress of the United States."

Further on in its opinion the Court in this case says:

"It is suggested by the learned Judge who delivered the opinion of the Supreme Court of Michigan in this case, that the tax imposed by the Act of 1875 is an exercise by the legislature of Michigan of the police power of the state for the discouragement of the use of intoxicating liquors, and the preservation of the health and morals of the people. This would be perfect justification of the act if it did not discriminate against the citizens and products of other states in a matter of commerce between the states, and thus usurp one of the prerogatives of the national legislature. The police power can not be set up to control the inhibitions of the Federal Constitution, or the powers of the United States Government created thereby. Gaslight Company v. Light & Heat Company, ante, 516.

106 Another suggestion in the opinion referred to is, that although the tax imposed by the act of 1875 may be a regulation of the introduction of spirituous liquor from another state into the State of Michigan, yet that regulation is not prohibition, and that there is nothing in the act that amounts to prohibition. The language of the court is "The statute does not prohibit the introduction and sale of liquors made outside of the state. It simply taxes the person who carries on the business here by making sales in this state. It — no way interferes with the introduction of the liquors here. It tolerates and regulates, but seeks not to prohibit. I think in this case no question can be successfully made under the clause of the Constitution until the point has been reached where regulation ceases and prohibition begins." We are unable to adopt the views of that learned tribunal as here expressed. It is the power to "regulate" commerce among the several states which the Constitution in terms confers upon Congress; and this power, as we have seen, is exclusive in cases like the present, where the subject of regulation is one that admits and requires uniformity, and where any regulation affects the freedom of traffic among the states.

Another argument used by the Supreme Court of Michigan in favor of the validity of the tax is, that it is merely a tax on an occupation which, it is averred, the state has an undoubted right to impose, and reference is made to Brown v. Maryland, 12 Wheat. 444 (25 U. S. bk. 6 L. Ed. 687); Nathan v. Louisiana 8 Howard 80 (49 U. S. bk. 12 L. Ed. 995); Pierce v. New Hampshire, 5 Howard 593 (46 U. S. bk., 12 L. Ed. 296); Hinson v. Lott, 8 Wallace 148 (75 U. S. bk., 19 L. Ed. 387); Machine Co. v. Cage, 100 U. S. 676 (bk. 25 L. Ed. 754). None of these cases however sustain the doctrine that an occupation can be taxed if the tax is so specialized as to operate as a discriminative burden against the introduction and sale of the products of another state, or against the citizens of another state.

107 We think that the act in question operates as a regulation of commerce among the states in a matter within the exclu-

sive power of Congress, and that it is, for this reason, repugnant to the Constitution of the United States and void."

In the case of State vs. Holleyman, 45 L. R. A., 576, Supreme Court of South Carolina had up for consideration the validity of a provision of the Dispensary Law of South Carolina, which allowed a person to use and keep in his possession intoxicating liquors for personal use purchased from the Dispensary without requiring a certificate of any kind either as to its chemical purity or that it was for personal use, but which required liquors purchased beyond the limits of the state which were for personal use to bear a certificate of its chemical purity and that it was for personal use. The court held that liquors purchased beyond the limits of the state must receive the same treatment as liquors purchased from the state dispensary.

In the course of its opinion, the court says:

"This dispensary law allows a person to keep in his possession for his own personal use, liquors which have been purchased from a dispensary without requiring a certificate of any kind either as to its chemical purity or that it is for personal use, to be attached thereto. Liquors purchased beyond the limits of the state, must receive the same treatment that is accorded liquors purchased within the state. As the liquor was purchased by the defendants for personal use, they had a right to keep it in their possession unmolested, until it was consumed in the use, as long as this privilege was allowed to persons having in their possession liquors bought from a dispensary; otherwise, there would be a discrimination in favor of the state and interstate commerce would thereby be burdened."

108 The Supreme Court of the State of Oklahoma, in the case of the State vs. Eighteen Casks of Beer, 104 Pac., 1093, has raised the question of the validity of the conveying clause in the Billups Bill, and says:

"The question of the validity of that portion of Section One, Article Three, which makes it a misdemeanor to ship or in any way convey intoxicating liquors from one place in this state to another place therein, except the conveyance of a lawful purchase as therein authorized, is neither raised nor passed on herein, it not being essential to the determination of this case. If it were, however, the question would arise as to whether or not that provision under the rules laid down in the cases of Scott vs. Donald, and Vance vs. Vandercook Company, supra, interfered with interstate commerce and — violative of the rights of citizens of other states, were it construed to include only the purchases from the state or local agency and to exclude purchases made in other states and brought into this state by interstate shipments."

For other authorities on the question of discrimination, see:

People vs. Buffalo Fish Company, 164 N. Y., 93; 58 N. E. 34;

Southern Ry. vs. Greensboro Ice & Coal Company, 132 Fed. 82;

People vs. Hawkins, 157 N. Y. 1;

Arnold vs. Yandis, (Ohio) 60 Am. St. Reports, 753;

Crescent Liquor Company vs. Platt, 148 Fed. 894; Minn. Brewing Co. vs. McGillivray 258;
Ad. Ex. Company vs. Kentucky, 214 U. S. 218; 53 Law Ed. 972;
109 State vs. Hickok, (Kansas), 58 Pac. 35;
State of Indiana vs. Lowry, 70 N. E. 728; 4 L. R. A. N. S. 528.
Cincinnati N. O. & T. P. Ry. Co. vs. Commonwealth, 104 S. W. 394;
State of Louisiana vs. Le Garde, 60 Fed. 186.

The meaning of the conveying clause of the Billups Bill is plain and unmistakable. The provision must of necessity be construed to include only purchases from the state, and to exclude purchases made in another state and brought into this state by interstate commerce. The language is plain * * * "except a lawful purchase as herein authorized." The only lawful purchase mentioned or in any way referred to in the act is one from the state. It therefore cannot, under the terms of the act, include a purchase made in another state and brought into this state by interstate commerce. If liquor is lawfully purchased from the state it may be lawfully conveyed anywhere in this state, but if purchased beyond the limits of the state, and brought into the state by interstate commerce, it cannot be lawfully conveyed except to the home or place of storage of the consignee. This is a discrimination against the purchase through interstate commerce and in favor of the purchase from the state.

This is where an interstate purchase is not accorded the same treatment as a purchase from the state. It is viciously discriminatory and is a he-vy burden upon interstate commerce in intoxicating liquors. The Wilson Act of 1890 has authorized state laws to become operative on an interstate shipment after its arrival at the place of destination and delivery there to the consignee, but
110 Congress has never authorized the state to pass discriminatory laws, and if the state law discriminate against the citizens or products of other states, and in favor of the citizens and products of the enactment state, it meets the bar of the Constitution of the United States, and is unconstitutional and void.

It has been contended that the constitutionality of the "conveying" clause may be saved by the courts declaring it inoperative upon the interstate purchase and holding that liquors lawfully purchased by means of interstate shipment may be lawfully conveyed after their arrival at the place of destination and delivery there to the consignee, from one place within the state to another place therein, as freely as though purchased lawfully from the state. But this construction would be violat-e of the plain intent and meaning of the language in which the conveying clause is couched. It would be legislation by judicial construction, which should not be indulged. The legislature of Oklahoma has enacted a discriminatory law. The courts should take what the Legislature in its act had done and determine whether or not it is constitutional. In our judgment, it

is necessarily unconstitutional and is therefore wholly inoperative and void.

But even though this court should hold that the "conveying" clause does not operate upon a purchase of liquor made by an interstate shipment, and places the interstate shipment upon an equal footing under the "conveying" clause with a purchase from the state, the appellant in this case has not violated the statute, because the evidence is conclusive, uncontradicted and undisputed, that the conveyance by him was an interstate purchase and was being
111 conveyed from the depot of the interstate carrier to his home.

If the court holds that an interstate purchase of liquor is not included within the meaning of the conveying clause, as "a lawful purchase as herein authorized" then the "conveying" clause is discriminatory and unconstitutional. If the court, on the other hand, holds that an interstate purchase is included within the meaning of the "conveying" clause, as expressed in the language—"a lawful purchase as herein authorized," then the purchase that appellant was conveying was a lawful purchase within the meaning of the act and he was guilty of no offense in transporting it. The state can take either horn of the dilemma it pleases; in either event, the appellant has violated no valid law, and this case should be reversed and remanded with instructions to grant appellant a new trial.

II.

Verdict and Judgment Contrary to Law and Evidence.

The liquor that appellant is charged with having conveyed was an interstate shipment and was being conveyed by appellant from the depot of the interstate carrier to his home at the time it was seized and the appellant arrested. It had been consigned by the Morrin-Powers Mercantile Company, at Kansas City, Missouri, to Charles Overton at Tulsa, Oklahoma, and shipped by way of the M., K. & T. Ry. Co. Appellant had received the liquor from the Katy Railway Company at its depot in Tulsa about ten minutes before appellant was arrested and the liquor seized by the officers. He was transporting it from the depot to his home, in a cab. The evidence is conclusive and undisputed. (Case Made, Pages 15 to 18, and 29 to 31.)

112 This brings this case clearly within the numerous decisions of this court heretofore rendered on the question of when the state law attaches to an inter state shipment of liquor.

In the case of High, et al, vs. State, 101 Pac., 115, this court, after reviewing many authorities, followed the decisions of the Supreme Court of the United States, and in the course of its opinion, says:

"These repeated and deliberate declarations of the Supreme Court of the United States, establishes two propositions:—first, that the Act of Congress commonly known as the 'Wilson Bill' permitted the states, in the exercise of their police powers, to enact laws prohibiting the sale, and making interstate shipment of intoxicating liquors upon their arrival in the state, subject to the operation of the police

power of the state. However, the state legislature has no authority to declare when such importations shall become subject to state control, nor can the state in any manner change or effect the enactment made by Congress upon the subject. Under the constitution Congress has exclusive power. Second: That the right to ship intoxicating liquors from one state into another and the shipment of the same is interstate commerce, and any citizen has the right to ship intoxicating liquors from one state into another, and a state law, organic or legislative, which denies or diminishes this right or substantially abridges, interferes —, or hampers the same, is in conflict with the Constitution of the United States, and this court is concluded by the decisions of the Supreme Court of the United States on this question."

At another point in the opinion this court says:

"The foregoing authorities settle the question that convey-
113 ing an unbroken, original package containing intoxicating liquors from the depot to the home of consignee, is a part of the interstate commerce transportation; and in this case the interstate shipment was not completed until the same was delivered at the home of defendant Whittmore."

In the case of McCord vs. State, 101 Pac., 280, this court again reviews the authorities on this subject, and in the course of its opinion, says:

"Under these adjudications, the time when such shipments lose their interstate commerce character, has been fixed as at the time when shipments reach their destination at the home or storeroom of the consignee. Upon that event they then become subject to the jurisdiction of the state. In the foregoing opinions upon the effect of the so-called 'Wilson Act,' although they do not state clearly, they imply that if a state should permit the manufacture, possession, sale and use of intoxicating liquors, both domestic and imported, within the state, without exception, then, under those conditions, the effect of this Act of Congress would permit the state to assume jurisdiction upon all imported liquors upon their arrival within the jurisdiction of the state; and the state, in the exercise of its police power, could exclude all such liquors as injurious to public health, the public morals and the public safety of its inhabitants. In the case of Scott vs. Donald, Justice Shiras said: "Such law may forbid entirely the manufacture and sale of intoxicating liquors and be valid." This would be within the letter and spirit of said act of Congress; the prohibitory law of the State of Oklahoma does not go that far.

That the traffic in liquor is not illegal or immoral per se, must be admitted. It is recognized in the prohibition requirement of the enabling act and in the prohibitory ordinance of the Okla-
114 homa Constitution conforming to said requirement. The prohibition law of Oklahoma (Chapter 69 p. 594, Session Laws 1908) being an act entitled "An Act to Establish a State Agency and Local Agencies for the Sale of Intoxicating Liquors for certain purposes; and providing for the refer-ing the same to the people; prohibiting the manufacture, sale, barter, giving away, or otherwise furnishing of intoxicating liquors except as herein pro-

vided; providing for the appointment of an attorney, and for the enforcement of the provisions of this Act; making an appropriation and declaring an emergency"—does prohibit the manufacture, but does not purport to prohibit the importation, sale, and use of intoxicating liquors. Article One provides for a state superintendent and local agents and for a state agency, and one local agency in each incorporated town of 2,000 population or more and in each county having no such incorporated town. Article Two provides the rules conducting such agencies and the conditions under which said liquor may be sold. Article Three makes it unlawful to make interstate shipments, to sell, barter, give away or otherwise furnish, "except as in this act provided," and provides for the enforcement of said law. It will be perceived by the provisions of said prohibition law, so far as the importation and sale of intoxicating liquors being prohibited, those operations are turned over to certain state officials, by whom, alone, or under whose direction, they are to be carried on."

Further on in the opinion, the court says:

"We are constrained to hold that the jurisdiction of the state does not take effect until the shipment reaches its destination at the home or place of storage of the consignee. Then, but not until then, can the state test the question of unlawful possession; and in this case the constructive possession *of* the defendant of the liquor in question was not a violation of any of the provisions of the prohibition law."

115 See Hudson vs. State, 101 Pac. 275;
Schweedes vs. State, 99 Pac. 804;
Gulf-Col. & Santa Fe Ry. Co. vs. State, ex Rel. (Just decided by the Supreme Court of the State of Oklahoma).

Applying the law of this case to the facts in the case at bar, the court will find the verdict of the jury contrary to the law and evidence, and the judgment of the trial court upon the verdict is contrary to law and the evidence and for this reason this case should be reversed and remanded.

III.

Misconduct of the Jury and Bailiff.

The jury had in the jury-room during the consideration of their verdict, a newspaper containing the following article:

"Sprung a Surprise."

"Overton Falls Back on the Interstate Commerce Defense."

"When Charles Overton was put on trial in county court yesterday on a charge of conveying liquor, he had a card up his sleeve which will probably be the means of gaining his acquittal. His own testimony backed up by documentary evidence and the word of a former railway employee showed that the transaction for

which he was put under arrest was of a nature to come within the meaning of an interstate shipment as ruled upon several times by Judge Gubser and held to be correct by the state attorney general.

116 "It is believed by many familiar with the case that he cannot be convicted on the charge if the precedent heretofore established is followed. Overton was caught by Deputy Sheriff Moran early in the morning of July 1, between midnight and three o'clock, while driving in a hack with two sacks of bottled whiskey. The arrest took place near the Frisco right-of-way on Elgin Avenue. The evidence appeared to be pretty plain against Overton, as there seemed to be little chance to claim that an interstate transfer of goods was taking place, for the reason that it was not customary to ship booze in sacks, as every one knows. A count of the bottle- when turned over to the sheriff's office showed that the sack contained ninety-four half pint bottles in addition to two broken, making a total of ninety-six. When the trial began, Attorney Biddison for the defense waived proof of the ownership and capture of the liquor, admitting that the whiskey was Overton's and that it had been taken under the circumstances related. Then Overton was put on the stand to show how he came to have it in his possession. He said that he had shipped the stuff in for his personal use, that he had just a few minutes before had it delivered to him at the Katy station by a freight clerk and that he was on his way directly home at the time of his capture. He told how he ordered a cab soon after midnight, had driven to a restaurant near the Katy station where Frank Carter, at that time warehouseman for the railway, had been aroused, and requested that he let him have two cases of whiskey which had been waiting his call. Carter complied, but the boxes were found to be damaged, to an extent that Overton hesitated to carry them. He therefore procured from the hackman a couple of gunny sacks and transferred the bottles from the cases. Overton produced the expense bill that he said he had paid the day before taking the goods. The bill shows the shipment to have left Kansas City on June 25, arriving in Tulsa two days later. On the bill is noted the fact that the shipment came in bad order. On being put on the

117 stand, Carter corroborated all of the important details of Overton's story.

"Overton was until recently a partner of Tom Taylor and together they have shipped vast quantities of booze into Tulsa. No one who has his eyes open, to conditions as they exist in Tulsa, but what knows that Overton is guilty of the grossest violations of the prohibitory law. Yet in the case now in court it unquestionably appears that he has no chance of being convicted for the reason that it has been held time and again that it is no offense to ship in liquor for personal use and to arrest a man in the act of transferring it from the station to his home is interferring with interstate commerce. It is probable that the case will be put into the hands of the jury this morning."

This article was read by the jury and discussed by them in the jury room while deliverating on their verdict.

During their deliberations, and after the jury had been unable to agree upon a verdict, and had returned to the jury-room for further consideration, one of the jurors opened the door of the jury-room and inquired of the bailiff how long they would be required to remain to agree upon a verdict, and the bailiff in charge of said jury in substance said that they would be required to agree and would be kept together until night or probably all night.

The foregoing is the mis-conduct of the jury and bailiff relied upon.

Preliminary to the question of the prejudice to the defendant by the reading of the newspaper article, we will discuss the propriety of the proof of the fact by the evidence of the jurors. And
118 we shall briefly note some of the cases on that question.

In the matter of Mattox vs. U. S., 146, U. S. 140, 36 Law Ed. 917, Supreme Court U. S. says:

"A juryman may testify to any fact bearing upon the question of the existence of any extraneous influence, althou-h not as to how far that influence operated upon his mind.

In the case of the State vs. Duncan 78 Pac. 427, the Supreme Court of Kansas permitted jurors to testify that one of the jurors stated, in the presence of his fellows, that he knew the defendant had been selling beer and that he knew that the defendant had followed the liquor busines- for years, and that thereupon the jury which stood largely for acquittal, agreed to a conviction. The court ordered a new trial for the misconduct.

The same court in the State vs. Rambo, 77 Pac. 563, held competent the evidence of a juror recited by him in the jury-room upon the failure of a person on trial to testify and held such evidence sufficient to impeach the verdict.

The same doctrine is laid down in Gottlieb Brothers vs. John Jasper and Co., 72 Kansas, 770, State vs. Parker, 65 Pac. 776, (Wash.); Harris vs. State, 40 N. W. 317 (Neb.).

In Brown vs. Leaman, 112 N. W. 185, the Supreme Court of Iowa held that the testimony of jurors, that they considered and gave weight to the evidence not properly before them, in
119 determining the question of their misconduct in disregarding an instruction withdrawing such evidence was competent, and the same court in Gribbon, et al. vs. Harman, 38 N. W. 139, admitted the affidavit of a juror to show that one of their number stated facts within his personal knowledge and that such alleged facts were used as an argument for the purpose of influencing the jury.

In Farrer vs. State, 2 Ohio State, 54, it is held that the testimony of a juror is competent to show that a jury had a newspaper in their possession containing a copy of the charge of the court and that the jury used such newspaper in their deliberations and that a new trial should be granted, although the charge contained in the newspaper should happen to be accurate.

Verdicts of juries have often been set aside because the jury had a newspaper in their jury-room during their deliberations.

In Myer, et al., vs. Cadwallader, 45 Fed. 32, a new trial was granted where the jury was presumed to have read a newspaper article which was less prejudicial than the newspaper article in this case. Morse vs. Montana Ore Company, 115 Federal 338 is a similar case, and in the case of People vs. McCay, 12 Pac. 272, the court says:

"The reading by a juror during the progress of the trial of a newspaper article containing some matter in connection with the subject matter of the trial which would be likely to influence him in the performance of his duties, is sufficient misconduct to warrant a new trial."

In State vs. Lantz, 23 Kansas, 728, a new trial was ordered
120 where the jury took into the jury room an Atlas which they consulted, although no showing was made by the prosecution that the rights of defendant were not prejudiced thereby.

In Kansas City, Missouri, B. R. Ry. Co. vs. Phillips, 13 S. W. 65, the court says:

"A new trial should be granted on the grounds of the misconduct of the bailiff and jury where it appeared that after they had been out over eight hours, and were unable to agree, they asked the bailiff 'How long the judge would keep them together,' to which he replied that he did not know, but that he supposed until Saturday or until the court was adjourned, and that within an hour the verdict was returned."

See also, Hobart vs. State, 68 Georgia, 182; Cole vs. Swan, 49 Green, 32.

IV.

Jury Refused to Follow Instructions of the Court.

The court instructed the jury that appellant had a right to convey the liquor to his home. The evidence was conclusive that that was what he was doing. The jury disregarded the instructions of the court and returned a verdict of guilty. Upon this question, we cite the following authorities:

Crane vs. Chicago & N. W. Ry. Company, 7 Am. St. Reports, 479;
Humphrey vs. Walker, 32 N. W., 386;
Hamilton vs. Maxwell, 32 Southern, 13.
Rankin vs. Thompson, 3 Pac., 719;
121 Georgia R. R. Co. vs. Mote, 48 S. E., 136;
Higgins vs. Lee, 16 Illinois, 495;
Sleeper vs. Des Moines, 93 N. W., 585;
Roman vs. Boston Trading Company, 87 Mo. Appeals, 186;
Chicago, etc., R. Co. vs. Cadwallader, 54 N. W., 976;
Nichols vs. Peck, 43 Atl., 1038;
Morris vs. Saint Paul F. & M. Insurance Company, 129 Fed., 233;
Cunningham vs. Ganze, 79 Hun., 434.

Conclusion.

We think the court will find, upon an examination of the record in this case, that all the questions presented for the court's consideration in this petition for re-hearing are properly saved in the record, and are properly presented to this court for its determination. We have omitted discussion of all questions that are not properly before the court in the record.

We contend, first, that the conveying clause in the Billup's Bill is unconstitutional and void, because it is discriminatory in permitting the conveyance of a lawful purchase from the state, while it prohibits the conveyance of a lawful purchase through interstate commerce. And, second, that if the court should, by judicial legislation read into the statute language that is not there, and hold that "a lawful purchase as herein authorized" includes a purchase through interstate commerce, still appellant is not guilty of
122 any offense because the liquor he was conveying was an interstate shipment in process of transportation from the depot of the carrier to appellant's home.

We submit confidently that the testimony in this case brings it squarely within the rule laid down by this court in the case of High vs. State, 101 Pac., 115, and McCord vs. State, 101 Pac., 280, and that the verdict of the jury and the judgment of the trial court finding the appellant guilty and sentencing him, is contrary to the law and the evidence.

The misconduct of the jury in reading and discussing the newspaper article in their jury-room and the misconduct of the jurors Green and Watts in their arguments with their fellow-jurors, as to what was within their personal knowledge, and the misconduct of the jury and bailiff in discussing the length of time that the jury would be held to agree upon a verdict, is reversible error and all this misconduct, looked at in the light of the fact that the verdict of the jury is palpably contrary to the evidence and the instructions of the court, is highly prejudicial and we submit that it would be rank injustice and a denial to this appellant of his constitutional right to a fair and impartial trial to affirm this case, and force this appellant to submit to the verdict of the jury that tried him in the court below.

The appellant is guilty of no offense under the law, and the verdict of the jury was rendered out of prejudice and without regard to the instructions of the court that appellant had a right to convey the liquor to his home, and we earnestly request that this
123 & 124 court grant appellant's petition for rehearing and reverse this case and remand it for a new trial.

Respectfully submitted,

BIDDISON & CAMPBELL,
DAVIDSON & WILLIAMS,
Attorneys for Appellant.

125 And thereafter, to-wit, on the 20th day of April, 1912, in the Criminal Court of Appeals of Oklahoma, the following proceedings were had in said cause:

Criminal Court of Appeals, March Term, 1912, April 20, 1912, Twenty-second Judicial Day.

No. A–307.

CHARLES OVERTON, Appellant,
vs.
STATE OF OKLAHOMA, Appellee.

And now this cause comes on for final decision and determination by the court upon the record, briefs and motion for rehearing filed herein.

And the court having considered the same finds that the motion for rehearing in the above cause should be denied.

It is therefore ordered and adjudged by the court that the motion for rehearing in the above cause, be, and the same is hereby denied, with directions to the clerk of this court to issue the mandate without further delay. Opinion by Furman. All Judges concur.

126 And thereafter, to-wit, on the 23rd day of April, 1912, in the Criminal Court of Appeals of Oklahoma, the following proceedings were had in said cause:

Criminal Court of Appeals Proceedings.

No. A–307.

CHARLES OVERTON, Plaintiff in Error,
vs.
STATE OF OKLAHOMA, Defendant in Error.

APR. 23, 1912.

Clerk of the Criminal Court of Appeals, Oklahoma City, Oklahoma:

The mandate in the case of Charles Overton v. State of Oklahoma, No. A-307, is recalled and will be withheld until counsel for appellant can prepare an appeal to the Supreme Court of the United States.

FURMAN, *P. J.*

127 In the Criminal Court of Appeals of the State of Oklahoma.

Certificate.

I, W. H. L. Campbell, Clerk of the Criminal Court of Appeals of the State of Oklahoma, do hereby certify that the foregoing 126 pages, numbered from one to 126 both inclusive, are a full, true and complete transcript of the record and all proceedings in the Criminal Court of Appeals of the State of Oklahoma, in case No. A-307, Charles Overton, Plaintiff in error, versus The State of Oklahoma,

Defendant in error, as the same remain on file and of record in my office.

In witness whereof, I hereto set my hand and affix the seal of said Court, at Oklahoma City, this 5th day of June, 1912.

[Seal Criminal Court of Appeals, State of Oklahoma,]

W. H. L. CAMPBELL,
Clerk of the Criminal Court of Appeals
of the State of Oklahoma,
By JESSIE PARDOE, *Deputy.*

Endorsed on cover: File No. 23,282. Oklahoma Criminal Court of Appeals. Term No. 294. Charles Overton, plaintiff in error, vs. The State of Oklahoma. Filed July 9th, 1912. File No. 23,282.

Office Supreme Court, U. S.
FILED
MAR 10 1914
JAMES D. MAHER
CLERK

Number 40

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

CHARLES OVERTON,
Plaintiff in Error,

vs.

STATE OF OKLAHOMA,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

C. B. STUART,
A. C. CRUCE,
Counsel for Plaintiff in Error.

Number 294.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

CHARLES OVERTON,

Plaintiff in Error,

vs.

STATE OF OKLAHOMA,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATEMENT.

On the 1st day of July, 1908, there was filed in the County Court of Tulsa County, Oklahoma, an information against the plaintiff in error, Charles Overton, and one Mitchell, charging that they did, on or about the 1st day of July, 1908, "In Tulsa County, State of Oklahoma, unlawfully, convey from one place within this state to another place therein, to-wit: from North Elgin and Brady

streets to the Frisco right-of-way and Elgin street in the City of Tulsa, Oklahoma, intoxicating liquors, to-wit: ninety-five pints of whiskey; the said Charles Overton and one Mitchell, not being then and there authorized by the laws of the State of Oklahoma, to convey said intoxicating liquors, and said intoxicating liquors so conveyed, not being of a lawful purchase as provided by the laws of the State of Oklahoma." (R. 16.)

On the 28th day of August, 1908, the plaintiff in error was placed upon trial, and after the hearing, was convicted, and sentenced to pay a fine of One Hundred ($100) Dollars and serve a term in prison of sixty (60) days in the County Jail. (R. 47.)

The case was appealed to the Criminal Court of Appeals of the State of Oklahoma, where, on the 20th day of May, 1912, the judgment of the trial court was affirmed. (R. 3-9.)

There was no conflict in the testimony—the entire evidence showing that the plaintiff in error was arrested while in possession of ninety-six pints of whiskey, which he was transporting from the M., K. & T. depot in the City of Tulsa to the right-of-way of the Frisco depot in such town; and that the whiskey had been shipped to him from Kansas City, Missouri, and delivered to him by the agent of the railway company some few minutes before his arrest.

ASSIGNMENTS OF ERROR.

FIRST: The trial court, as well as the Criminal Court of Appeals, erred in holding that the Act of the Legislature, which prohibits the transportation of liquor from one point within the state to another point therein, was not in conflict with the Constitution of the United States

SECOND: The trial court, as well as the Criminal Court of Appeals, erred in not holding that the act for which the plaintiff in error was convicted, was an act in aid of Interstate Commerce, and, therefore, not a violation of law.

ARGUMENT.

Section 4156 of Snyder's Compiled Laws of Oklahoma, creates a State Agency for the purpose of selling intoxicating liquors in the State of Oklahoma. It is unnecessary to refer, in detail, to the provisions in this statute, further than to state, that, under certain conditions, it makes lawful the purchase of intoxicating liquors from the state. Section 4180 of the same statute provides "It shall be unlawful for any person, individual or corporate * * * to ship, or in any way convey, **such liquor from one place within this state to another place therein,** except the conveyance of a lawful purchase as herein authorized." It is clear, therefore, that this statute permits the transportation from one place to another within the state, of any liquors that are purchased from the State

Agency, while, it makes it unlawful, the transportation of similar liquors purchased outside of the state and brought within the state by Interstate Commerce.

The question for decision, therefore, is, whether or not the Statute discriminates against liquors lawfully purchased outside the state and lawfully introduced into the state. If it does, the law is unconstitutional; if it does not, the law is valid.

Under the provisions of the statute, a party may purchase liquors from the state agency, and thereafter take it to his home, and thereafter still transport it from his home to some other place within the state without violating the law. If, however, he purchase liquors from outside the state, he cannot, after it has been delivered to him at his home, transport it to another place in the state, or indeed to another place upon his own premises, without violating the law. Is this a discrimination in favor of purchases from the state agency, and, therefore, necessarily a burden upon Interstate Commerce? If a citizen of Oklahoma may lawfully purchase liquors outside of the state and transport them to his home with the same freedom that he may purchase plows or other agricultural implements outside the state and transport them to his home, why may he not, without becoming a criminal, remove the liquors from one point to another within the state, just as he may remove his agricultural machinery? Is it not necessarily a burden upon Interstate Commerce to say,

that, while a citizen of Oklahoma may purchase liquor from St. Louis and have it shipped to his residence, he may not, after the delivery of the same to his residence, convey the same from his larder to his dining table, without violating the law?

The very able Judge who delivered the opinion of the Criminal Court of Appeals in this case (Judge Furman), while holding that the act does not contravene the Constitution, seems not to manifest any too great a degree of confidence in the conclusion to which the court arrived. (R. 55.)

The Supreme Court of Oklahoma in the case of State v. Eighteen Casks of Beer, while not deciding, indicates in the following language that the question is not free from doubt:

> "The question of the validity of that portion of Section One, Article Three, which makes it a misdemeanor to ship or in any way convey intoxicating liquors from one place in this state to another place therein, except the conveyance of a lawful purchase as therein authorized, is neither raised nor passed on herein, it not being essential to the determination of this case. If it were, however, the question would arise as to whether or not that provision under the rules laid down in the cases of Scott v. Donald, and Vance v. Vandercook Company, supra, interfered with interstate commerce and violative of the rights of citizens of other states, were it construed to include only the purchases from the state or local agency and to exclude purchases made in other states and brought into this state by interstate shipments."

A kindred question to that now before the Court, was before the Supreme Court of South Carolina, in case of State v. Holleyman, 45 L. R. A. 576, where the court says:

> "This dispensary law allows a person to keep in his possession for his own personal use, liquors which have been purchased from a dispensary without requiring a certificate of any kind either as to its chemical purity or that it is for personal use, to be attached thereto. Liquors purchased beyond the limits of the state, must receive the same treatment that is accorded liquors purchased within the state. As the liquor was purchased by the defendants for personal use, they had a right to keep it in their possession unmolested, until it was consumed in the use, as long as this privilege was allowed to persons having in their possession liquors bought from a dispensary: otherwise, there would be a discrimination in favor of the state and interstate commerce would thereby be burdened."

It would seem that Scott v. Donald, 165 U. S. 58, and Vann v. Vandercook Company, 170 U. S. 438, conclusively determine the controversy in favor of the plaintiff in error.

The Oklahoma statute does not undertake absolutely to prohibit the sale, manufacture or transportation of liquors. On the contrary, it makes lawful the traffic in such goods, reserving to the state the sole right to sell such liquors. The statute, of course, must be construed as not intended to interfere with the right of a citizen of Oklahoma to purchase liquors outside the state and have them shipped to him within the state. Under this construction, the statute places upon liquors shipped into

the state, a burden that is not borne by liquors purchased from the state. Of course, if the statute should be construed as meaning, that liquors purchased outside of the state, are placed upon the same footing as liquors purchased from the state, the case would be reversed for the very good reason that the testimony conclusively shows that the liquors, for the transportation of which the defendant was convicted, were shipped to him from Kansas City, Mo. It is not believed, however, that this construction will meet the approval of the court. Manifestly, the purpose of the statute was to permit intra-state transportation on only such liquors as were purchased from the state agency. The statute does not undertake to define what the word "place" means—whether the merchant's place of business, the farmer's entire premises or the particular spot or locus in which the liquors may happen to be. If the word "place" is given its ordinary acceptation, the statute would prohibit the transportation of interstate shipments from one room to another or from the cupboard to the table.

In any view we take of the case, it is clear, that liquors shipped into Oklahoma from outside of the state, are burdened with restrictions that interfere with, and hamper, such commerce.

If it should be suggested that liquors could not lawfully be shipped into Tulsa County (Ex parte Webb, 225

U. S. 663) the answer is, that the liquors in question were shipped to the plaintiff in error in the city of Tulsa, Oklahoma, a municipality that was no longer Indian country, and that such shipment was, therefore, lawful.

We respectfully submit, therefore, that the provision of the Oklahoma statute, which undertakes to penalize transportation or removal of liquors from one point in the state to another point therein, is in conflict with the Federal Constitution, and, therefore, this case should be reversed.

Respectfully submitted,

C. B. STUART,
A. C. CRUCE,
Counsel for Plaintiff in Error.

FILED
OCT 15 1914
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 40.

CHARLES OVERTON, PLAINTIFF IN ERROR,

vs.

STATE OF OKLAHOMA, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT FOR THE STATE.

CHAS. WEST,
Att'y Gen'l of Oklahoma,
Att'y for Appellee.

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SUPREME COURT OF THE UNITED STATES.

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No. 40.

CHARLES OVERTON, PLAINTIFF IN ERROR,

vs.

STATE OF OKLAHOMA, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT FOR THE STATE.

Statement.

Defendant was prosecuted for conveying intoxicating liquor from point to point in the State of Oklahoma, said liquor not being a lawful purchase.

The evidence was conflicting as to whether the 96 half pints of whiskey found in a gunny sack about 2 a. m., with which defendant was fleeing in a speedily driven hack, which at first refused to stop at the police officer's command, were the contents of two cases of whiskey then recently shipped to defendant over the M., K. & T. R. R. from Kan-

sas City, Missouri, or whether this liquor was other than that (pp. 6 and 7 and 20 *et seq.*, Record).

This issue was presented to the jury under proper instructions and by them decided against appellant (pp. 35, 37, 38, Record).

That there was sufficient evidence to support the verdict was held by the Oklahoma appellate court (pp. 6, 7, 8, Record).

But in any event it was an illegal shipment as made into the city of Tulsa, Oklahoma, within the confines of what was formerly Indian Territory, and as such not protected by any Federal law over interstate commerce, but expressly prohibited from commerce by act of 1895. *Ex parte* Webb, 225 U. S., 663, at page 689.

The judgment should be affirmed.

Respectfully submitted,

CHAS. WEST,
Att'y Gen'l of Oklahoma,
Att'y for Appellee.

Mr. Charles West, Attorney General of the State of Oklahoma, for defendant in error.

Memorandum opinion by direction of the court, by MR. CHIEF JUSTICE WHITE.

The verdict and sentence were on an indictment for illegally moving liquor (§ 4180, Snyder's Compiled Laws of Oklahoma, 1909). The defense was that the movement was to complete an interstate shipment from Missouri. The court instructed that the statute did not apply to such a shipment and hence if the movement was as asserted, there must be an acquittal. Under this situation the contention here made that the statute was repugnant to the commerce clause is too frivolous to support jurisdiction. And this is also true of the contention that there is jurisdiction because the facts establish that the conclusion of guilt could only have been reached by plainly disregarding the proof as to the character of the shipment, thus in fact applying the statute to interstate commerce,[1] since the record affords no justification for the assumption upon which the proposition rests.

Dismissed for want of jurisdiction.

[1] *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573, 591; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261; *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 611; *Portland Ry. Co.* v. *Oregon R. R. Com'n*, 229 U. S. 397, 411–412; *Miedreich* v. *Lauenstein*, 232 U. S. 236, 243–244; *Missouri, Kans. & Tex. Ry.* v. *West*, 232 U. S. 682, 691–692.